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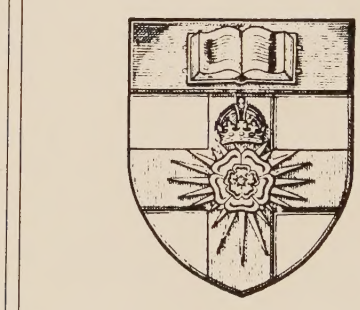

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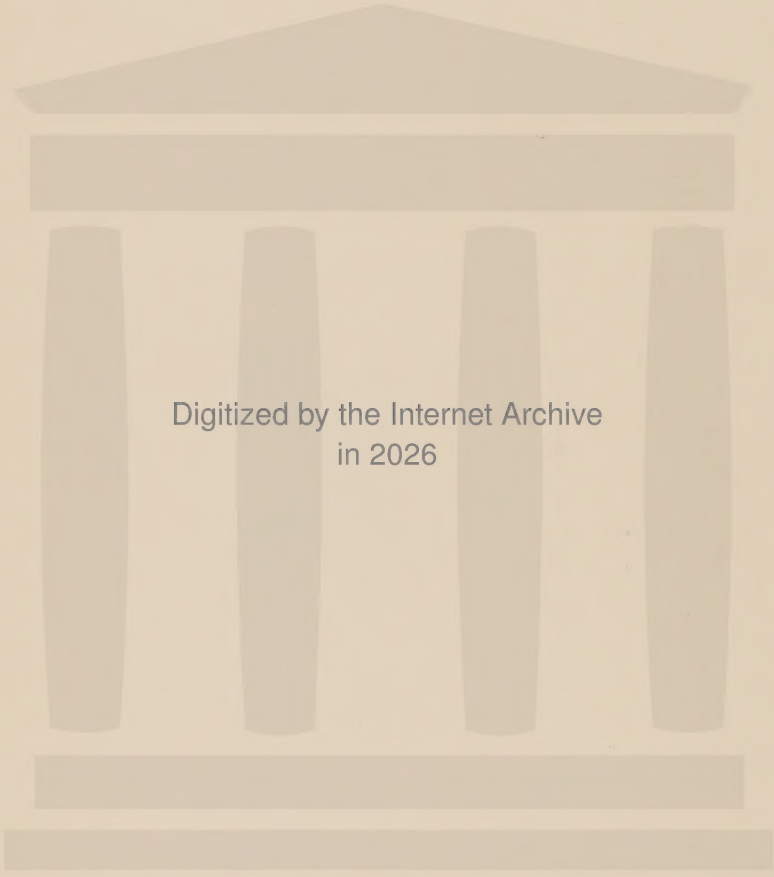

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CASES

DETERMINED BY THE

CHANCERY DIVISION

AND IN

LUNACY

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL.

In re PECKHAM, DULWICH AND CRYSTAL PALACE TRAMWAYS BILL.

C. A. 1910 *April* 21.

[1909 P. 228.]

Tramway Company—Statutory Undertaking—Parliamentary Deposit—Sale of Undertaking before Completion of Works and within the Time limited for Completion— Non-completion—Abandonment—Application of Deposit Fund —Parliamentary Deposits and Bonds Act, 1892 (55 & 56 *Vict. c.* 27), *s.* 1.

By a special Act of 1885 a tramway company was authorized to construct a tramway and a deposit was ordered to be paid.

The Parliamentary Deposits and Bonds Act, 1892, s. 1, provided that where in pursuance of any general or special Act of Parliament moneys had been deposited "to secure the completion by any company" of any undertaking authorized by Parliament, and the undertaking had "not been completed" within the time limited in that behalf, the deposit fund should be applied towards compensating landowners and, in the case of a tramway company, the road authorities, and subject thereto, if (among other things) a receiver had been appointed, or the undertaking had been abandoned, for the benefit of the creditors of the company. The special Act of 1885 contained a substantially similar provision as to the application of the deposit fund if the company did not complete the tramway within the time limit.

In 1904, when the tramway had not been completed and before the expiration of the period for completion, a receiver of the undertaking of the company was appointed and the uncompleted tramway was acquired by the London County Council under the powers of a special Act:—

Held, that both under the special Act of 1885 and under the general Act the deposit was paid to secure the completion of the undertaking by

C. A.

1910

PECKHAM, DULWICH AND CRYSTAL PALACE TRAMWAYS BILL, *In re.*

the company, and that, inasmuch as that event could never happen by reason of the transfer of the undertaking, the time had passed within which the company could complete; and, further, that there had been an abandonment of the undertaking by the company; consequently that the deposit moneys paid under the Act of 1885 were applicable for the benefit of the creditors of the company subject to the prior claims (if any) of the landowners and road authorities.

APPEAL from a decision of Neville J. (1)

By the Peckham and East Dulwich Tramways Act, 1882 (45 & 46 Vict. c. ccxiii.), certain persons were incorporated by the name of "The Peckham and East Dulwich Tramways Company," and the company were authorized to construct the tramways described in the Act. Sects. 6 and 7 of the Act contained provisions for dealing with a sum of 754*l.* Consols, that had been deposited in Court as security for the completion of the tramways, if the company should make default in completing the tramways within the time limit; and s. 36 limited two years for the completion of the tramways.

By the Peckham and East Dulwich Tramways (Extension) Act, 1883 (46 & 47 Vict. c. ccxxvii.), the company were authorized to construct additional tramways. Sect. 19 of the Act limited a time for the completion of the tramways; and ss. 22 and 23 contained provisions as to the parliamentary deposit of 900*l.* Consols in Court under the Act similar to those contained in ss. 6 and 7 of the Act of 1882.

The Peckham and East Dulwich Tramways Act, 1885 (48 & 49 Vict. c. cxcix.), authorized the company to construct the additional tramways mentioned in the Act, and provided (s. 5) that no part of tramway No. 1 authorized by the Act should be constructed "unless and until Rye Lane shall have been widened to the satisfaction of the local and road authorities." Sects. 24 and 25 of the Act contained provisions as to the parliamentary deposit of 1239*l.* Consols in Court under the Act similar to those in ss. 6 and 7 of the Act of 1882; and s. 43 limited two years for the completion of the works.

The Peckham and East Dulwich Tramways Act, 1887 (50 & 51 Vict. c. clxxxiii.), recited the Acts of 1882, 1883, and 1885, and after reciting (inter alia), "Whereas certain of the tramways

(1) [1909] 2 Ch. 540.

authorized by the Acts of 1882 and 1883 have been constructed but could not be opened with advantage to the public before the authorized tramway in Rye Lane had also been constructed but the formation of the last mentioned tramway has from time to time been delayed until Rye Lane is widened and it is therefore expedient that the time for opening those tramways for the conveyance of passengers should be revised and extended. And whereas it is expedient that other tramways authorized by the said Acts should be abandoned and so much of the money or stock deposited in respect thereof repaid or retransferred to the company," enacted :—

Sect. 6 : " The time limited by the Act of 1885 for the completion and opening of the tramways authorized by that Act other than the tramways by this Act directed to be abandoned shall be and the same is hereby extended and enlarged until the expiration of one year from the 14th of August, 1887 . . . . provided that the time for completing so much of tramway No. 1 as was authorized by the said Act to be laid down in Rye Lane is hereby extended until the expiration of one year after the intended widening of Rye Lane is carried out."

Sect. 8 extended the time limited by the Acts of 1882 and 1883 for such of the tramways authorized by those Acts as were not authorized to be abandoned to August 14, 1888.

Sect. 9 empowered the company to abandon the formation of certain specified tramways.

Sect. 13 provided for payment out of so much of the Consols in Court as represented the tramways directed to be abandoned.

Sect. 17 changed the name of the company to " The London, Camberwell and Dulwich Tramways Company."

Difficulties arose as to the widening of Rye Lane, and in 1904 Rye Lane had not been widened, and consequently tramway No. 1 had not been constructed, and in August, 1904, a receiver of the company's undertaking was appointed by the Court in an action against the company by its mortgage bond holders ; and in December, 1904, the London County Council, under the powers of the London County Council (Tramways and Improvements) Act, 1904 (4 Edw. 7, c. ccxxxi.), acquired for 6500*l.* " the tramway undertaking of the company free from all charges

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debts claims demands liabilities and incumbrances . . . . but as from the passing of this Act" (August 15, 1904) "all rights powers and authorities in respect of the said undertaking conferred and liabilities imposed upon the company or their predecessors in title by the Peckham and East Dulwich Tramways Act, 1882, the Peckham and East Dulwich Tramways (Extensions) Act, 1883, the Peckham and East Dulwich Tramways Act, 1885, and the Peckham and East Dulwich Tramways Act, 1887, or any of them, shall be transferred to and vested in and may thereafter be exercised by the council." The Act of 1904 also empowered the council (amongst other things) to widen Rye Lane and to lay a tramway therein, and limited seven years for the completion of the works authorized by that Act. The 6500*l.* was paid into Court in the mortgage bond holders' action and was applied in and towards payment of the principal, interest, and costs due to them, and the receiver was discharged. There remained, however, a balance due to the mortgage bond holders, and the company was insolvent.

Under s. 13 of the Act of 1887 the deposit funds in Court under the company's special Acts of 1882, 1883, and 1885 had been reduced by payments out in respect of the tramways that were authorized to be abandoned, and those funds were now represented by the following sums of Consols in Court, namely, 556*l.* 19*s.* 4*d.* under the Act of 1882, 416*l.* 11*s.* 9*d.* under the Act of 1883, and 340*l.* 14*s.* 5*d.* under the Act of 1885.

An unsatisfied mortgage bond holder, who was also a large unsecured creditor, applied that these sums in Court might, subject to all proper inquiries being made, be applied as part of the assets of the company for the benefit of the creditors thereof.

The right of the applicant turned upon the construction of the provisions, which were common form, of the special Acts of 1882, 1883, and 1885 with respect to the application of the deposit moneys in the event of the tramways not being completed by the company within the time limit and of s. 1 of the Parliamentary Deposits and Bonds Act, 1892. (1)

(1) Sect. 1: "(1.) Where in pursuance of any general or special Act of Parliament, or by any rules made thereunder, moneys or securities have been deposited with, or are standing in the name of, the Paymaster General

Neville J. decided the question upon the construction of the Parliamentary Deposits and Bonds Act, 1892, s. 1, and held that that section contemplated completion by the company within the time limit. He accordingly held that the undertaking had not been completed by the company because the London County Council Act of 1904 had put it out of the power of the company to complete, and further that the sale of the incomplete undertaking to the London County Council amounted to an abandonment by the company within s. 1 of the Act of 1892. The applicant was therefore entitled to an inquiry in the usual form as to the moneys in Court subject to inquiries with regard to the claims (if any) of landowners and road authorities.

One of the depositors appealed so far as the judgment affected the 340*l.* odd deposited under the Act of 1885. It was assumed for the purpose of the appeal that the moneys in question related solely to tramway No. 1, the Rye Lane tramway.

E. Ford, for the appellant. Neville J. has held that, although the time limited for completion has not expired, the undertaking has

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to secure the completion by any company of any undertaking authorised by Parliament . . . . and the undertaking has not been completed within the time limited in that behalf, the High Court may, notwithstanding anything in any such general or special Act or rules, order that the moneys or securities (in this Act called the deposit fund), or any part thereof, be applied towards compensating any landowners or other persons whose property has been interfered with or otherwise rendered less valuable by the commencement, construction, or abandonment of the undertaking, or of any portion thereof . . . . and also, in the case of a tramway company, towards compensating the road authorities for the expenses incurred by them in taking up any tramway or materials connected therewith placed by the tramway company in or on any road vested in or maintainable by the road authorities, and in making good all damages caused to such roads by the construction or abandonment of the tramway.

"(2.) Subject to payment of any such compensation, and notwithstanding any provision as to forfeiture to the Crown, the High Court may, if a receiver has been appointed, or the company is insolvent and has been ordered to be wound up, or the undertaking has been abandoned, order that the deposit fund or any part thereof be paid or transferred to the receiver or to the liquidator of the company, or be applied as part of the assets of the company for the benefit of the creditors thereof."

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not been completed by the company within the prescribed time, and that it has been abandoned. The question turns upon the construction of the Parliamentary Deposits and Bonds Act, 1892. That Act is intituled "an Act to authorise the release of certain deposits, and the cancellation of certain bonds, made or given to secure the performance of undertakings authorised by Parliament," and s. 1, sub-s. 1, provides that where moneys are deposited "to secure the completion by any company of any undertaking authorised by Parliament . . . . and the undertaking has not been completed" within the prescribed time the deposit fund shall be applied in compensation of landowners and road authorities, and sub-s. 2 says that subject thereto, if a receiver has been appointed or if the company has been ordered to be wound up or the undertaking has been abandoned, the fund shall be applied for the benefit of the creditors of the company. The only object of the deposit is to secure the completion of the undertaking and not the completion by any particular company, and that is the meaning of the Act. The words "by any company" in sub-s. 1 are descriptive only and are intended to distinguish a company from an individual. The sub-section says "completed," not "completed by the company"; and the title also speaks of the performance of undertakings, not performance by any particular undertakers. It is the construction of the tramway which affects the landowners, and it does not matter to them whether it is completed by the original undertakers or not. Further, sub-s. 2 must be read as dependent on sub-s. 1. The result is that there is no taking away of the rights of the depositors unless the time limited for completion, whether by the original company or by a statutory assignee, has expired.

[COZENS-HARDY M.R. Sect. 25 of the special Act of 1885 (1) speaks of completion by the company.]

(1) Sect. 25: "If the company do not previously to the expiration of the period limited for the completion of the tramways complete the same and open them for the public conveyance of passengers then and in every such case the deposit fund or so much thereof as shall not have been paid to the depositors shall be applicable, and after due notice in the 'London Gazette' shall be applied towards compensating any landowners or other persons whose property has been interfered with or

The only Act to be looked at now is the general Act of 1892, and s. 25 of the special Act is repealed by implication. The special Act of 1904 does not provide for the payment of any deposit, and it cannot have been the intention of the Legislature that the landowners affected by the construction of this tramway should be deprived of all remedy. There is no reason why the claims of the landowners and the claims of the depositors should be cut out merely because the work is completed by B. instead of A. The Court has no jurisdiction to apply this fund in the manner proposed until the expiration of the time limited for completion: *Ex parte Chambers.* (1)

[COZENS-HARDY M.R. The observations of North J. in that case must be read with reference to the state of facts with which he was dealing.]

The learned judge there treated the undertaking as abandoned. Further, there has been no abandonment here. A company does not abandon an undertaking by transferring it.

Christopher James, for the respondent, was not called upon.

COZENS-HARDY M.R. I think that the decision of Neville J. was perfectly right. A tramway company obtained parliamentary powers for the construction of certain tramways, and a

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otherwise rendered less valuable by the commencement construction or abandonment of the tramways or any portion thereof and shall be distributed in satisfaction of such compensation as aforesaid in such manner and in such proportions as to the Chancery Division in the High Court of Justice in England may seem fit and if no such compensation is payable or if a portion of the deposit fund has been found sufficient to satisfy all just claims in respect of such compensation then the deposit fund or such portion thereof as may not be required as aforesaid shall either be forfeited to Her Majesty . . . . or in the discretion of the Court if the company is insolvent and has been ordered to be wound up or a receiver has been appointed shall wholly or in part be paid or transferred to such receiver or to the liquidator or liquidators of the company or be otherwise applied as part of the assets of the company for the benefit of the creditors thereof: Provided that until the deposit fund has been repaid to the depositors or has become otherwise applicable as hereinbefore mentioned any interest or dividend accruing thereon shall from time to time and as often as the same shall become payable be paid to or on the application of the depositors."

(1) [1893] 1 Ch. 47.

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deposit according to the rules of the Houses of Parliament was paid. The terms on which the deposit was paid are stated in s. 25 of the Act of 1885. That section says "If the company do not previously to the expiration of the period limited for the completion of the tramways complete the same and open them for the public conveyance of passengers" certain consequences shall follow. That is to say the deposit fund, after satisfying the claims of any landowners whose property has been interfered with by the commencement, construction, or abandonment of the tramways, shall, if the company is insolvent or a receiver has been appointed, be applied for the benefit of the creditors of the company. The time for the completion of this undertaking has not yet expired, but two events have happened. In the first place a receiver has been appointed. He was a receiver of the undertaking, including the purchase-money for the purchase of the undertaking by the London County Council to which I am about to refer. Secondly, by an Act of Parliament intituled the London County Council (Tramways and Improvements) Act, 1904, which received the Royal assent the day after the receiver was appointed, it was provided that the council should purchase and that the tramway company should sell for the sum of 6500*l.* the tramway undertaking of the company free from all charges, debts, claims, demands, liabilities, and incumbrances. The sale was to be completed within four months, but as from the passing of the Act all rights, powers, and authorities in respect of the said undertaking conferred and liabilities imposed upon the company by the several Acts of 1882, 1883, 1885, and 1887, or any of them, were to be transferred to and vested in and might thereafter be exercised by the council. Now the time within which the London County Council can exercise their powers of completing this tramway has been extended and has not yet expired. The contention of Mr. Ford, who has argued this case very clearly and ably, is that the deposit was not intended to secure the completion of this tramway by the company, but that all rights are satisfied if the tramway is completed by anybody within the period sanctioned either originally or by subsequent extension by Parliament, and that, as this tramway can be and probably will be completed by the London County Council within

the authorized period, the creditors have no right to claim this deposit, which is not part of the undertaking itself. I agree that the deposit forms no part of the undertaking, although under the general Act of 1892 the Court has power to apply it as part of the assets of the company for the benefit of the creditors. I think that that argument cannot prevail. I think that the deposit was paid in to secure the completion of the undertaking by the company. That is expressed in s. 25 of the Act of 1885, and there is nothing in the general Act of 1892 which repeals that section. Nay, more, if you scrutinize that Act closely the completion there contemplated by the Legislature is completion by the company. But then it is said that it is rather hard on the landowners that they should have no fresh deposit as security against the London County Council. But when you get to the bottom of that argument it is really the same proposition over again. The deposit was only required to secure completion by the undertakers. There may have been some damage accrued in the interval which has elapsed, but the order of Neville J. very properly directs an inquiry whether any such damage has arisen. It is true that this deposit is not applicable to satisfy claims of landowners for damage occasioned by the acts of the London County Council, but Parliament thought fit to authorize the London County Council to complete this work without exacting any further deposit from them. It is quite plain why that was not done. The London County Council stand in a very different position from this insolvent tramway company, and the landowners are quite sufficiently protected by the provision which transfers to the London County Council all the obligations to which the tramway company would have been liable. I read the Act of 1892 in the same way as Neville J. did—that the deposit fund was to secure the completion of the work by the company. That event has not happened and can never happen by reason of the passing of the London County Council (Tramways and Improvements) Act, 1904, and the transfer of the undertaking to the council. I agree with him that the time has passed within which the company could complete, and further that the undertaking has been abandoned by the company. These are substantially the reasons

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adopted by Neville J. I think that his judgment is quite right and that this appeal should be dismissed.

BUCKLEY L.J. The Peckham Company had statutory authority to do certain works upon the terms of making a certain deposit. Sect. 25 of the Act of 1885 provided that if the Peckham Company did not within the time limited for completion complete the tramways and open them to the public, the deposit should be applied in the usual way, towards compensating landowners and others whose property was affected by the works, and subject thereto, if the company was insolvent or a receiver was appointed, for the benefit of the creditors of the company. In 1892 was passed a general Act as to deposits. That Act it is true does not use the words "where the undertaking has not been completed by the company," but says simply "completed." The Act, however, did not affect to repeal or alter s. 25 of the Act of 1885, but left untouched the provision that if the Peckham Company did not complete within a certain time, then the deposit should be applied in the usual way. Then in 1904 two things happened. A receiver was obtained of the undertaking of the Peckham Company and an Act was passed under which the London County Council were to buy the undertaking of 1885. The time limited for the completion of the tramway in question in this action, tramway No. 1, has not yet expired, but the Peckham Company can never now complete that tramway. The Legislature has thought proper to allow the London County Council to acquire the undertaking and has not thought proper to impose upon them the obligation of providing a deposit as was done in the case of the Peckham Company. The Peckham Company is now a company which is unable ever to complete this tramway. The words of sub-s. 2 of s. 1 of the Act of 1892 therefore apply. They have abandoned it in the sense that they have become subject to statutory provisions by which the power to complete has been taken away from them and has been given to somebody else. I think that Neville J. was right in saying that this was an abandonment. The argument on behalf of the appellant results in this, that if a company upon the terms of making a deposit is allowed (say) five years within which to

complete a work and for three years does acts which affect the property of the neighbouring landowners and then becomes insolvent, and the liquidator sells to another who is not required to make a deposit, the money must be returned to the depositors and the landowners will get no compensation. In my opinion that argument is untenable. The deposit was intended to provide against the default of the person who was required to make the deposit. The result is that this deposit must be applied for the benefit of the creditors in the manner provided by the Act of Parliament.

KENNEDY L.J. I am of the same opinion. I only desire to add with regard to the authority which has been cited to us by Mr. Ford, *Ex parte Chambers* (1), before North J., that it appears to me that that decision may rightly be supported in the peculiar state of facts upon which it was based, at any rate, without in any way being taken to assert anything at variance with our present decision. If there are any dicta which appear to lead to a different conclusion I should say, speaking for myself, that such dicta ought not to be followed. I agree that this appeal should be dismissed.

Solicitor for appellant: *S. S. Seal.*
Solicitors for respondent: *Lingard & Leach.*

(1) [1893] 1 Ch. 47.

H. B. H.

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STOURCLIFFE ESTATES COMPANY, LIMITED *v.* CORPORATION OF BOURNEMOUTH.

[1909 S. 3478.]

Vendor and Purchaser—Corporation—Ultra vires—Purchase by Agreement—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *s.* 164—*Special Act—Covenant not to erect Buildings—Validity of Covenant—Restriction of Powers given for Benefit of Public.*

When a corporation purchases land by agreement for any of the purposes for which it is authorized to acquire land by the Public Health or other public Acts, or by its special local Acts, it is not ultra vires for the corporation to enter into covenants with the vendor restricting the erection of buildings upon the land purchased which it might erect under other powers given to it for the benefit of the public, provided that such restrictions do not prevent the user of the land for the particular purposes for which it was acquired.

Ayr Harbour Trustees v. *Oswald*, (1883) 8 App. Cas. 623, distinguished.

In re South Eastern Ry. Co. and Wiffin's Contract, [1907] 2 Ch. 366, discussed.

By an indenture dated January 16, 1904, and made between the plaintiff company of the first part, W. H. Gater of the second part, and the Bournemouth Corporation of the third part, after reciting an agreement in writing between the parties that in consideration of the completion of certain roads and works therein specified, which had been completed, the company and W. H. Gater would execute the respective conveyances and make the dedication of land thereinafter contained, it was witnessed that, in consideration of 2000*l.* paid by the corporation, the company and W. H. Gater conveyed to the corporation (1.) the sites of certain roads to be held as highways and (2.) a piece of land therein described adjoining the sea. The habendum was in the following words:—

"To hold the same unto the corporation in fee simple as regards so much thereof as lies to the north of the slope of the cliff to be devoted to the purpose of a public garden or pleasure ground. And the corporation hereby covenant with the company their successors and assigns to preserve and keep the land to be devoted to pleasure ground purposes as an open space for the enjoyment of the public in such manner and form as the

corporation shall think best in the interest of the public subject to no building or erections of any kind being put thereupon except such structures as summer houses a band stand or shelters not more than 12 feet in height for the accommodation and convenience of the public."

By the same deed the company dedicated a certain footpath to the public.

In acquiring the land for a public garden and pleasure ground the corporation were acting under the Public Health Act, 1875, s. 164, which provides: "Any urban authority may purchase or take on lease lay out plant improve and maintain lands for the purpose of being used as public walks or pleasure grounds." It has been decided that a corporation may erect upon lands required for the purposes of this section buildings which are conducive to the better enjoyment of the public walks and grounds, such as a free public library, a conservatory and museum: *Attorney-General* v. *Sunderland Corporation.* (1) The Bournemouth Corporation had further powers under a local Act, the Bournemouth Improvement Act, 1892 (55 & 56 Vict. c. clxiii.), s. 85, which enacted: "(1.) The corporation may erect maintain furnish and equip and may remove conservatories refreshment rooms and other buildings and conveniences in any public park garden or recreation ground which may be required or convenient for the purpose of such park garden or ground and the public resorting thereto."

The corporation proposed to erect upon the part of the land conveyed to them for the purpose of a public garden, which lay nearest to land retained by the plaintiff company for building upon, certain lavatories and urinals. Upon the plaintiff company objecting to this, they slightly altered the plans of their erections by adding an open shed, which they called a shelter, between the lavatories.

The plaintiff company brought this action to restrain the corporation from erecting the proposed structure. The corporation's defence stated (1.) that the proposed structure was a shelter for the accommodation of the public within the meaning of the exception in the covenant; (2.) that the covenant was ultra

(1) (1876) 2 Ch. D. 634.

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vires on the ground that it restricted the exercise by the corporation of powers given them by statute for the benefit of the public, and of which they were trustees. The first point turned merely on the construction of the words of the particular deed and does not call for a detailed report.

The action came on for trial before Parker J. on March 9, 10, and 11, 1910.

Romer, K.C., and *MacSwinney*, for the plaintiffs.

A. Grant, K.C., and *J. G. Wood*, for the corporation.

PARKER J., after stating his conclusion that upon the construction of the deed the erection of the proposed lavatories would be a breach of the covenant, continued:—

Secondly, it is contended that the covenant is wholly void on the ground that it is an agreement restricting the exercise by a statutory corporation of powers vested in it for the public benefit. In support of this contention the defendants rely upon the cases of *Mulliner* v. *Midland Ry. Co.* (1), *Ayr Harbour Trustees* v. *Oswald* (2), and *In re South Eastern Ry. Co. and Wiffin's Contract.* (3)

In the first of these cases a railway company had purported to grant a right of way under an arch which carried their railway, the land having been compulsorily acquired for the purposes of the railway, and it was held that there was no power to grant any such right, more especially as in the opinion of the Court such a right, if granted, might interfere with the proper maintenance of the statutory undertaking. In the second case certain harbour trustees, upon acquiring land compulsorily for the purpose of a statutory undertaking, had, in order to reduce the amount which they would have to pay for compensation, offered a covenant restricting the user of the land for the purposes for which it was acquired, and it was held that such a covenant would be void. In the third case a railway company had acquired by agreement land over which they had compulsory powers for certain defined purposes, and they had covenanted to use the

(1) (1879) 11 Ch. D. 611. (2) 8 App. Cas. 623.
(3) [1907] 2 Ch. 366.

land for one only of such defined purposes, and it was again held that the covenant was void.

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In each of these cases the grant or contract precluded the purchaser from using the land for the purposes or some or one of the purposes for which the Legislature said it might be acquired and to which it was in fact dedicated by statute. I have come to the conclusion that the principle involved in the three cases referred to is not really applicable to the covenant in the present case. The land in question was not specified in any Act of Parliament as land which the corporation might acquire for any defined purposes, and the covenant did not in any way preclude the corporation from using the land for the purposes or any of the purposes for which it was in fact acquired, but merely precluded them from exercising with regard to such land certain ancillary and subsidiary powers with which they had been entrusted by the Legislature, but the exercise of which is not imperative for the purposes for which the land was acquired, but permissive only.

Parker J.

I may add that I am not sorry to come to this conclusion, for, unless a corporation upon acquiring lands for parks and pleasure grounds can enter into such a covenant, it will be harder to acquire land for such purposes, and the price of land so acquired will be enhanced. A landowner may be, and often is, desirous of keeping land unbuilt upon for the benefit of other parts of his property, and subject to this he may probably be ready to dedicate the land which he desires to remain open and unbuilt upon to the public either as a park or pleasure ground or garden or in some other way, but he will in many cases be deterred from so doing if he cannot convey to a corporation or other local authority without the risk of having libraries, museums, restaurants, and other buildings erected on it, or if he cannot bargain with a corporation or other local authority not to have a public convenience placed immediately in front of sites upon which he proposes to erect houses for the sake of some view of the sea or other view. It appears to me, therefore, that the decision is all in the interests of the public.

The corporation appealed. The appeal was heard on April 26 and 27, 1910.

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A. Grant, K.C., and *J. G. Wood*, for the appellants. The covenant is void as restricting the statutory powers of the corporation: having acquired this land for the purposes of a park, the corporation has no power to covenant that it will not exercise some of its statutory powers with reference to parks, such as the putting up of public lavatories. It is not competent for a body of this kind to contract not to use their statutory powers. The principle of *Ayr Harbour Trustees* v. *Oswald* (1) and *Mulliner* v. *Midland Ry. Co.* (2) applies. *In re South Eastern Ry. Co. and Wiffin's Contract* (3) is expressly in point and seems to cover the present case. The corporation has these various powers entrusted to it for the benefit of the public and has no right and no power to bargain them away. The covenant under these circumstances has no operation, and this shelter need not be removed.

Romer, K.C., and *MacSwinney*, for the respondents, the plaintiff company. The corporation have power to acquire land by agreement for numerous purposes, and when they acquire land by agreement for a particular purpose they are at liberty to covenant that they will not use it for some of the other purposes. Any such doctrine as that contended for by the appellants would render it almost impossible for a corporation to obtain land by agreement at all.

Mulliner v. *Midland Ry. Co.* (2) and *Ayr Harbour Trustees* v. *Oswald* (1) are distinguishable. The land in those cases was devoted by statute to certain specified purposes and was acquired compulsorily for those particular purposes. Here the land is acquired by agreement for a park, but it was not affected by any of the parliamentary purposes specified in the special Act, and there is no reason why the corporation in purchasing the land by agreement should not covenant not to put up lavatories or anything else that might be objectionable. Even in the case of a railway company, where land is taken by agreement, stipulations contained in the contract will be enforced: *Sanderson* v. *Cockermouth and Workington Ry. Co.* (4) Even in the absence

(1) 8 App. Cas. 623, 639.
(2) 11 Ch. D. 611.
(3) [1907] 2 Ch. 366.
(4) (1850) 2 H. & Tw. 327.

of any contract the corporation cannot use the land for any purpose except that for which they bought it: *Attorney-General* v. *Pontypridd Urban Council.* (1) *In re South Eastern Ry. Co. and Wiffin's Contract* (2) is a very questionable decision, but it is distinguishable because it was the case of a railway company.

A. Grant, K.C., in reply. The broad principle is that where a corporation is given powers for the good of the public it cannot contract not to use them. That principle is laid down in its full breadth in *Ayr Harbour Trustees* v. *Oswald.* (3) There is no real distinction between a railway company and a corporation having powers under the Public Health Act. Each body is a trustee for the public of the powers which have been given to it. *Staffordshire and Worcestershire Canal Navigation* v. *Birmingham Canal Navigations* (4) and the case before Neville J. (2) are cases of the application of that principle. Of course a corporation cannot use land for a purpose inconsistent with that for which they acquired it, but they can exercise over it, and cannot release, all general powers not inconsistent with that purpose: *Attorney-General* v. *Hanwell Urban Council.* (5) *Sanderson* v. *Cockermouth and Workington Ry. Co.* (6) was a case of accommodation works to which different principles apply. [He also referred to *Kirby* v. *Harrogate School Board.* (7)]

COZENS-HARDY M.R. This is an appeal from Parker J., and it raises two points: (1.) What is the construction of a certain deed by which a piece of land, containing, I think, eight acres more or less, was conveyed by the plaintiffs to the corporation of Bournemouth, assuming the parties to be competent, and (2.) whether the covenant is binding upon the corporation. As far as regards the construction of the deed, I think that that is clear and upon that point the judgment of Parker J. was perfectly correct.

But the second point is this: Is the covenant binding upon the corporation? I ask myself, why not? It was a voluntary

(1) [1906] 2 Ch. 257.
(2) [1907] 2 Ch. 366.
(3) 8 App. Cas. 623.
(4) (1866) L. R. 1 H. L. 254.
(5) [1900] 2 Ch. 377.
(6) 2 H. & Tw. 327.
(7) [1896] 1 Ch. 437.

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bargain made between the corporation and the plaintiffs. There is no dedication by Parliament of this particular land to any particular purpose. The purposes are defined by the parties in the deed itself. Can it seriously be contended that the corporation cannot accept as a gift or make a purchase of land for a park subject to any restrictions of any sort or kind, such as, to give one which is a very reasonable and very common one, that no intoxicating liquors shall be sold on part of it? Of course, if Mr. Grant's argument is right, such a condition would be impossible. But, further, if they have taken this conveyance of this land in terms subject to these restrictive covenants, can they hold it free from those restrictions? That again is a proposition which seems to me to be startling. If the deed is wholly ultra vires I can understand it, but to suppose that the corporation could be allowed to retain the land and to repudiate the consideration or part of the consideration for it is a proposition to which certainly I could not give my adhesion.

But then it is said the House of Lords has in principle decided this case and it is binding upon this Court. Of course if the House of Lords had decided anything of the kind we should follow it with perfect loyalty. But have they? The case which is relied upon is *Ayr Harbour Trustees* v. *Oswald.* (1) What was that case? It was a case where the Act of Parliament, for public purposes and in the public interest, declared that certain land should be purchased by the undertakers, who were given compulsory powers for the purpose. That land included Mr. Oswald's land. Not only were they to make the harbour and a quay, but they had power—it was obviously part of the essence of the undertaking—to make over any part of the land so purchased, certain warehouses facing a certain road. The parties did not agree as to the price. There was an arbitration, and it was referred to an umpire or oversman, and then the harbour trustees said, We shall have to pay a much larger sum unless we agree with Mr. Oswald that we will not put any of these erections on the portion of the land adjoining, I think, his land, and the oversman, as they call him, made an award giving two figures, the larger one if they purchased as the Act of Parliament

(1) 8 App. Cas. 623.

required that the land should be purchased, the smaller one if the purchase was releasing this part of the land from that imposition which, in the public interest, Parliament had imposed upon it. The House of Lords said: Non constat that Parliament would have given you a right to purchase this land except for the full interest; non constat that Parliament would have sanctioned your purchasing this with a special exception in favour of Mr. Oswald, and we cannot therefore allow you to say, against Mr. Oswald's wish, We would rather not purchase this land in the form in which Parliament alone has given us power to purchase it, and we shall be very happy to take something less and to pay you a less consideration. Under those circumstances the House of Lords said, confirming the view of the Scotch Court, that that was a transaction which could not stand. But that proceeded really upon this, as Lord Blackburn puts it(1): "Powers conferred on the body empowered to take the land compulsorily are intrusted to them, and their successors, to be used for the furtherance of that object which the Legislature has thought sufficiently for the public good to justify it in intrusting them with such powers; and, consequently, that a contract purporting to bind them and their successors not to use those powers is void." What has that to do with a case of this kind? I can see no analogy at all. Here the corporation have general powers to purchase land for, inter alia, the purposes of a public park. They may go anywhere they like and may make a contract with anybody who is willing to enter into a contract with them for these purposes, and to say that a vendor under those circumstances cannot rely upon a restrictive covenant entered into by the purchaser would really be to render it practically impossible for a municipal corporation ever to enter into a contract with a landowner for purposes of this kind; for no landowner would be so unwise as to say "I will convey this land or I will give this land, but mind you I cannot impose upon you any kind of covenant or restriction, however reasonable it may be, because such a covenant will not bind you." In principle the case of *Ayr Harbour Trustees* v. *Oswald* (2) seems to me to be entirely different, and there is, so far as I am aware, no authority

(1) 8 App. Cas. 634. (2) 8 App. Cas. 623.

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whatever to justify the proposition which has been contended for by Mr. Grant, unless it be the decision of Neville J. in the case of *In re South Eastern Ry. Co. and Wiffin's Contract.* (1) There the South Eastern Railway Company were authorized to acquire land for extraordinary purposes: "'enter upon, take, use and appropriate for the purpose of enlarging and extending their stations and siding accommodation and for roads and approaches and for other purposes of and connected with their undertaking.' . . . . Under this power the company in 1889 acquired by voluntary agreement about two and a half acres of land described in the deposited plans, and it was duly conveyed to them. By the conveyance the company covenanted for themselves and their assigns with the grantors, their heirs and assigns, that the company and their assigns would 'for ever thereafter use the said piece of land thereby conveyed with the buildings then and thereafter to be erected thereon as a passenger station for the accommodation of the traffic of their line and for no other purpose.'" The company did not want the land, and they, acting under s. 13 of the Lands Clauses Act, in pursuance of a plain and unambiguous section of that Act, agreed to sell. Sect. 13 is this: "It shall be lawful for the promoters of the undertaking to sell the lands which they shall have so acquired for extraordinary purposes, or any part thereof, in such manner, and for such considerations, and to such persons, as the promoters of the undertaking may think fit . . . ." They entered into a contract for sale, and the purchaser required the covenant to be released. The simple answer was that Parliament had said, At any time if you do not require this land you may sell it, and, that being so, it was quite manifest that a covenant that land should only be used as a passenger station for the accommodation of the company's line could not from the necessities of the case be in any way binding upon the purchaser to whom they were authorized to sell it under the terms of the Act. Now Neville J. held that the covenant was not an objection and that the purchaser would get a good title. He cited the case of *Ayr Harbour Trustees* v. *Oswald* (2) and said (3): "Now applying

(1) [1907] 2 Ch. 366. (2) 8 App. Cas. 623.
(3) [1907] 2 Ch. 369.

that decision to this case, I think the company have undoubtedly purported to deprive themselves of the right to exercise over the land which they acquired under s. 5 any of their powers other than the one specified in the covenant. I think, therefore, that the case falls within the principle of *Ayr Harbour Trustees* v. *Oswald* (1), and that the covenant is bad." With great respect to the learned judge, I think that his decision was perfectly right in that case, but I am bound to say I am unable to follow or adopt the particular chain of reasoning by which he arrived at that decision.

In my view this covenant is binding upon the municipal corporation, the act they are doing is plainly in contradiction of that covenant, and the order made by Parker J. granting the injunction was perfectly right, and this appeal must be dismissed with costs.

BUCKLEY L.J. On the first point I hold that the word "shelter" in this deed does not include a urinal or a lavatory. Upon the second point I confess I feel no difficulty at all either upon principle or upon authority. First upon principle. This corporation has, by virtue of certain statutes, power to acquire lands either by agreement or compulsorily for certain purposes. Supposing they acquire them compulsorily, they do that under s. 176 of the Public Health Act, 1875, and in order to do so they have to state the purpose for which the lands are wanted, and adjoining owners may at an inquiry which has to be held be heard to say that the lands ought not to be taken for that purpose. The Local Government Board in holding the inquiry may empower the local authority to put in force its power with respect to purchasing the land either absolutely or with such conditions and modifications as the Board may think fit. If the corporation were going to acquire land compulsorily they would have to condescend upon the purpose for which they wanted it, and they could be limited as regards the way in which they were to use the land if they acquired it. If, for instance, they wanted to acquire land compulsorily for a public park, it might be made a condition upon which they should acquire it

(1) 8 App. Cas. 623.

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that they should not have any bands there, because (say) they would be an annoyance to the neighbouring residents, or that they should not have urinals there, or that they should close the park at certain hours, or any number of restrictions which it might be reasonable and proper to impose. The present case is not a case of acquiring compulsorily, it is a case of acquiring voluntarily; but equally the corporation which is acquiring must acquire not for all and every purpose for which they can acquire land anywhere, but for some definite purpose, some one of the purposes in respect of which they are entitled to acquire land. If they say "We want this land for a public park in which we shall have no occasion to put a urinal," I cannot conceive any reason why they should not, by way of bargain with the person from whom they are going to buy, say "We offer to buy your land and we will bind ourselves not to put a urinal there." It is said that that is divesting themselves of some power, because under s. 85 of their Act of 1892 they could have put a urinal there. That section means that it is not an improper expenditure of money by the corporation to, amongst other things, erect urinals in proper places, but it is not necessary that the corporation should with every piece of land which they buy acquire also the right to put a urinal there. In principle I see no ground whatever why the corporation in contracting to buy should not bind themselves that they will use the land for a limited purpose, will use it for the purposes (say) of a park, and a park in which there shall not be any urinal.

Is there any difficulty as regards authority? The authority principally relied upon is *Ayr Harbour Trustees* v. *Oswald*. (1) It seems to me that that authority does not assist in any way the purpose for which it is cited. The case was the simplest possible. The decision of the House of Lords was that where there is a corporation, such as a railway company or a harbour board, which the Legislature has empowered compulsorily to take certain scheduled lands recognized to be wanted for the purposes of its undertaking, and the Legislature has at the same time conferred upon the corporation statutory rights to do acts for their public purposes upon lands thus acquired, the

(1) 8 App. Cas. 623.

corporation cannot release part of their powers to the vendor of the land, binding themselves not to use them, and divesting themselves and their successors of the right to use those lands, which the Legislature has said are wanted for their undertaking, in the manner and with the rights which the Legislature granted for the furtherance of the undertaking. It seems to me that that is the whole decision in the case of *Ayr Harbour Trustees* v. *Oswald*. (1) I fail to see how it has any application to this case. There you find particular lands which the particular authority is authorized to take upon the footing that they want them for their undertaking, and for the purposes of their undertaking the statute has said they shall have certain powers. The House only decided that as regards land thus acquired the authority cannot release the powers which the Act of Parliament has attached to those lands. In the present case I think it clear that the corporation were entitled to acquire this land subject to the limitation expressed in the covenant to this deed. The injunction was rightly granted and this appeal should be dismissed.

Kennedy L.J. I am entirely of the same opinion.

There are, as has been already pointed out, two distinct questions, one of construction, and the other of the legality of the particular contract which was entered into, in the sense of its being a contract into which the corporation could enter so as to bind itself. Upon the question of the agreement I can entertain no doubt that the shelters therein mentioned do not include buildings which are, as the building proposed to be erected is, urinals or lavatories, nor is such an erection ejusdem generis with a shelter.

Then comes the question of law which has been so fully dealt with by the Master of the Rolls and Buckley L.J. that I need only say that I entirely concur. The authorities which were cited, for the reasons which have been already most clearly stated and explained, do not upon examination afford any ground, in my opinion, for the proposition for which Mr. Grant has contended. I will only say this: that with regard to the case

(1) 8 App. Cas. 623.

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before Neville J. I concur in the criticism which the Master of the Rolls has made. The reasoning as stated in that judgment affords at any rate some colour to the argument Mr. Grant sought to found upon it, and, without wishing to throw any doubt upon the correctness of the decision, I think, with great respect to Neville J., that I should feel a difficulty in concurring entirely with him in the reasoning upon which that decision is founded.

BUCKLEY L.J. I wish to add that I agree with what the Master of the Rolls has said as regards the decision in *In re South Eastern Ry. Co. and Wiffin's Contract.* (1) I think the decision there was right, although I am unable to follow the reasoning upon which it was based. I think the learned judge overlooked the fact that the purchaser, who was the person affected there, was not the successor of the company who purchased the land.

Solicitors: *Chester, Broome & Griffithes; Soames, Edwards & Jones.*

(1) [1907] 2 Ch. 366.

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[1908 D. 107.]

April 11, 12, 13; *May* 4.

Design — Registration — Infringement — "New or original" — Patents and Designs Act, 1907 (7 *Edw.* 7, *c.* 29), *ss.* 49, 50, 93.

Sect. 49 of the Patents and Designs Act, 1907, provides for the registration of "any new or original design not previously published in the United Kingdom"; and the Act gives protection to a design so registered. The word "original" in that section contemplates that the designer has by the exercise of intellectual activity conceived an idea, which has not previously occurred to any one else, of applying a particular pattern or shape or ornament to the particular article to which he suggests that it shall be applied. If that state of things be satisfied, then the design may be "original" although the actual pattern or shape or ornament under consideration be old in the sense that it has existed previously with reference to another article.

The plaintiffs were the owners of a registered design in class 3 for a pattern or ornament of hand grip for cycle handles. The design consisted of an engine-turned pattern in wavy lines applied to the hand grip, and broken up into panels by deep longitudinal grooves, the hand grip terminating in a ring separating the panels from the smooth end of the cylindrical handle bar. The engine turning was of a common pattern and none of the other details of the design were new. In an action for infringement Warrington J. held that the design was "new or original" having regard to the kind of article for which it was registered:—

Held, on appeal, that there was no novelty or originality in applying to a cycle handle a form of decoration which, as was proved, was in common use upon other articles of a cylindrical shape.

Decision of Warrington J. reversed.

Appeal by the defendants from a decision of Warrington J.

The plaintiffs, a firm of cycle accessory manufacturers, were the registered proprietors of a design, No. 469,643, registered in class 3 for a pattern or ornament of hand grip for cycle handles. The plaintiffs alleged that the defendants, a German corporation carrying on business in this country, had infringed their design, and they brought this action for an injunction, damages, and delivery up of all infringing goods.

The defendants pleaded that the plaintiffs' design was not a "new or original design not previously published in the United

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Kingdom" and alleged that it was commonly known for many years prior to the date of registration. They also denied that they had infringed the design. The design in question consisted of a succession of parallel wavy lines, commonly known as engine turning, not continuous, round the whole of the hand grip, but broken up into panels, the panels being separated by deep longitudinal grooves. There was a further element in it, that the engine turning was separated from the smooth end of the handle grip by a small fillet or segment of a circle. It was proved at the trial that the engine turning used in the design was of a common form pattern and had for many years past been used on different kinds of articles such as knife handles, penholders, and other cylindrical objects.

The plaintiffs contended that the design had not been previously applied to cycle handles and that as a whole it was both distinctive and original.

Warrington J. held that though the details of the design were in a sense old, yet the design was new and original having regard to the kind of article for which it was registered. He held also that the defendants had infringed it, and granted an injunction accordingly.

The defendants appealed.

Buckmaster, K.C., *Walter, K.C.*, and *Maugham*, for the appellants. The question for decision is, Can a trader take a well-known pattern, apply it to a well-known article, and then, if it has never been used on such an article before, obtain protection for it by registering the whole as "a new or original design" under s. 49 of the Patents and Designs Act, 1907? We say he cannot.

The form of the handle is old. The engine-turned pattern is old and has long been used for many other forms of handle, and in order to obtain protection there must be some novelty or originality in the design: *Saunders* v. *Wiel.* (1) *Harrison* v. *Taylor* (2) is distinguishable. The protection granted by registration is for a pattern, or an ornamentation which is "new or original." This pattern is not new and not original, though it

(1) [1893] 1 Q. B. 470, 474. (2) (1859) 4 H. & N. 815; 29 L. J. (Ex.) 3.

may be new as applied to a bicycle handle. There is no such originality or novelty in this design as to make it a proper subject for registration; the Act does not refer to the articles to which a design is applied, it refers to the design applied to them: *In re Clarke's Design.* (1)

Sect. 93 defines "a design," which is to be a conception or idea of a shape, picture, or device which is to be applied to the article to be manufactured. [*In re Read & Greswell's Design* (2) and *In re Bach's Design* (3) were also cited.]

As a fact the two articles are not the same, and the defendants' handle grip is not an infringement of the plaintiffs' design even if it be properly registered.

H. Terrell, K.C., and *D. M. Kerly*, for the respondents. The word "design" is not intended to be used in any technical sense so as to exclude anything that would ordinarily fall within it; it is applicable to shape or configuration: *Heath & Sons* v. *Rollason.* (4) "Design" is not intended for limiting ornamentation as distinct from configuration. The design here consists of the entirety, the whole thing as shewn in the picture. A trader may take an old ornamentation or pattern and apply it to an article to which it has never been applied before, and by registering the whole obtain protection. It does not matter how old the idea may be if it is applied to a new purpose: *Hecla Foundry Co.* v. *Walker, Hunter & Co.* (5) The design as a whole is "new or original." In *In re Read & Greswell's Design* (2) there was no originality; there is some originality in our design. Ever since 6 & 7 Vict. c. 65 the words have been "new *or* original," and in s. 49 of the Patents and Designs Act, 1907, the words are the same; consequently the design may be registered even if it be not new, provided it is original: *Sherwood & Cotton* v. *Decorative Art Tile Co.* (6); *John Harper & Co.* v. *Wright & Butler Lamp Manufacturing Co.* (7); *In re Pearson's Designs.* (8) Slight though distinct alterations would have enabled us to register this design even if a design for bicycle handles was already registered. It

(1) [1896] 2 Ch. 38.
(2) (1889) 42 Ch. D. 260.
(3) (1889) 42 Ch. D. 661.
(4) [1898] A. C. 499.
(5) (1889) 14 App. Cas. 550.
(6) (1887) 4 Rep. Pat. Cas. 207.
(7) [1896] 1 Ch. 142.
(8) (1906) 23 Rep. Pat. Cas. 738.

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is not the article that is put on the market but what is registered that must be considered: *In re Bayer's Design.* (1)

Cur. adv. vult.

May 4. COZENS-HARDY M.R. agreed with the following judgments read by the Lords Justices.

BUCKLEY L.J. The provisions as to designs in the Patents and Designs Act, 1907, give rise to many questions of difficulty, but while the argument in the present case has extended over a wide field, the matter which we have to decide falls, I think, within a small compass. From s. 93 (the definition section of the Patents and Designs Act, 1907) I learn that a design means something which is applicable to an article by printing, painting, &c., or any other means whatever, manual, mechanical, or chemical. Design means, therefore, a conception or suggestion or idea of a shape or of a picture or of a device, or of some arrangement which can be applied to an article by some manual, mechanical, or chemical means. It is a conception, suggestion, or idea and not an article which is the thing capable of being registered. It may, according to the definition clause, be applicable to any article whether for the pattern or for the shape or configuration or for the ornament thereof (that is to say, of the article), or for any two or more of such purposes. The design, therefore, is not the article, but is the conception, suggestion, or idea of a shape, picture, device, or arrangement which is to be applied to the article by some one of the means mentioned in the definition clause. It is a suggestion of form or ornament to be applied to a physical body. The design must be new or original. The statute 5 & 6 Vict. c. 100, s. 3, had used the words "new and original." The statute 6 & 7 Vict. c. 65, s. 2, used the words "new or original," and the latter words have been maintained in the subsequent Acts and are to be found in the Act now in force in the relevant section, s. 49, although s. 50 drops back into the expression "new and original." If the design be new it may be registered under that expression, but the Act by s. 49 seems to contemplate that it may be registered even if it be not new

(1) (1906) 24 Rep. Pat. Cas. 65.

provided that it be original. The explanation of this lies possibly in the fact that the novelty may consist not in the idea itself, but in the way in which the idea is to be rendered applicable to some special subject-matter. The word "original" contemplates that the person has originated something, that by the exercise of intellectual activity he has started an idea which had not occurred to any one before, that a particular pattern or shape or ornament may be rendered applicable to the particular article to which he suggests that it shall be applied. If that state of things be satisfied, then the design will be original although the actual picture or shape or whatever it is which is being considered is old in the sense that it has existed with reference to another article before. It is more easy by illustration in the concrete than by words in the abstract to explain what I mean.

First a few illustrations as to shape. The traditional figure of Falstaff is as old as Shakespeare, but if a person conceived for the first time the idea of making a wine-beaker in the form of the figure of Falstaff that would be an original design for a wine-beaker. The same would be true of an Uncle Toby jug for beer. The same would be true of adopting the form of a beehive or of a wine cask to form the case which shall contain an inch measure for use in a lady's work-basket. Secondly, a good illustration of pattern in the sense of picture may be given, I think, from the damascening which is common upon sword blades or gun barrels. If a person conceived the idea of using that pattern or picture for the purpose of marbling the edges of books or of making a particular sort of watered silk for a lady's dress he would, I conceive, have originated a design not because damascening was new, but because the use upon the marbled edges of books or in the weaving of silk for a dress of the pattern arrived at by damascening had not occurred to any one before. The words "new or original" involve the idea of novelty either in the pattern, shape, or ornament itself or in the way in which an old pattern, shape, or ornament is to be applied to some special subject-matter. There must be the exercise of intellectual activity so as to originate, that is to say suggest for the first time, something which had not occurred to any one before as to applying by some manual, mechanical, or chemical means some pattern,

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shape, or ornament to some special subject-matter to which it had not been applied before. For the purpose of deciding this case I do not think it is necessary to deal further with difficulties which arise under the Act.

The facts here are that the plaintiffs registered their design as a pattern or ornament of hand grip for cycle handles. The thing shewn in the picture which is attached to the certificate is an end piece or hand grip intended to be fixed on the end of the metal tube which forms the handle of the bicycle. The circumference of the hand grip as to the greater part of its length is divided by fairly deep grooves into six panels, and each panel is ornamented with engine turning of sinuous pattern. The ends of the article are plain rings with certain small grooves upon them. A bicycle handle of this form and with these grooves was not new. The engine turning placed upon the panels between the grooves was perhaps the commonest form of engine turning which was known. There was nothing in the form of the article apart from the engine turning or in the engine turning placed upon it which had any novelty whatever. It is true that that exact combination of that exact form of handle with that exact engine turning had not been produced before. In my opinion this was not a new or original design capable of being registered under the Act. Upon the plaintiffs' evidence there is good ground for saying that the novelty which was claimed in the witness-box was a novelty of the ornamentation of the bicycle handle with the engine turning, but there was no novelty in this engine turning, and there is no originality in suggesting the placing upon a bicycle handle a form of decoration which, as was proved, was common upon knife handles, penholders, and numbers of articles of that kind. If there were a well-known pattern which was in use on damask table cloths there would, in my opinion, be no new or original design in reproducing the same thing upon a wall paper. The design in that case is the picture which in the weaving of the linen or the printing of the paper is placed upon the one article or the other.

The respondents' counsel, however, argued that the design was not the engine turning, but was the shape and ornamentation of the bicycle handle as a whole as appearing by the picture upon

the certificate of registration. I then ask myself what new or original design was there in that well-known form of bicycle handle, grooved as it had previously been, ornamented with that engine turning which was common upon other cylindrical or approximately cylindrical bodies? There was nothing then which was new, every part was old, and what did the designer originate? Nothing except the idea of putting the picture which really is the design upon a bicycle handle instead of a penholder. In my opinion there is in this no originality. If, however, the respondents' counsel are right in saying that the design is the whole thing as shewn in the picture, then it seems to me that the defendants have not infringed. Their handle is not divided into six panels, but into nine panels. Their grooves are so much more shallow than the plaintiffs' grooves as to be easily distinguishable from them. Fraudulent imitation there was certainly none, neither was there obvious imitation either. In my judgment this Act was intended to protect designs which really have some merit by way of novelty or originality, and not to give colour to such paltry and trivial claims as have been set up in this case. The appeal must, I think, succeed, and the action be dismissed with costs.

KENNEDY L.J. In this case there are two distinct questions to be decided, namely, (1.) whether the plaintiffs' pattern or ornament of hand grip for cycle handles registered as a design on November 23, 1905, and in reference to which a further certificate dated January 28, 1908, was produced, is a new or original design not previously published in the United Kingdom; (2.) whether there has been an infringement by the defendants. I am unable to agree with Warrington J. on either of these two points. I will briefly deal with them in order. I am not sure whether in the use of the expression "new or original" in the Patents and Designs Act, 1907, the Legislature intended any real alternative. The statute 5 & 6 Vict. c. 100, s. 3, used the expression "new and original." The statute 6 & 7 Vict. c. 65, s. 2, used the expression "new or original." The 46 & 47 Vict. c. 57, s. 47, used "new or original," and in s. 61 "new and original." And, lastly, whilst in s. 49 of the Act of 1907

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(the Act now in force) the words are "new or original," s. 50 declares that the registration of a design shall not be invalidated on the ground of the design not being a "new and original" design. For the decision of the present case it appears to me to be immaterial whether the Act intended by the use of the alternative form of words in s. 49 to import a distinction between novelty and originality or not. If we must find a distinction, I should be inclined to interpret "original" as referring to a design which no previous designer had created for any purpose, and "new" as referring to a design which was not in this sense original, but was newly and for the first time applied to the particular kind of article, with reference, not to the classification in the Third Schedule of the Designs Rules, 1908, but to the kind of article having regard to its general character and use, according to the view expressed by Lindley L.J., in reference to the Act of 1883, in *In re Clarke's Design* (1), where he aptly illustrates his meaning by saying "a design may be new for a coal-scuttle, but not for a bonnet." Whether, however, there be or be not any shade of difference between the words "new" and "original" as used in the Act of 1907, I cannot find in any sense either novelty or originality in that which the present plaintiffs have registered. Under s. 93 a design applicable to any article may be registered, "whether the design is applicable for the pattern, or for the shape or configuration, or for the ornament thereof." The plaintiffs have registered their design only as a "pattern or ornament." It is not claimed to be a design for shape or configuration. Of the cases referred to in argument, *In re Clarke's Design* (2) was a case of registration of a design applicable for its shape; so were *Walker, Hunter & Co.* v. *Falkirk Iron Co.* (3) and *Hecla Foundry Co.* v. *Walker, Hunter & Co.* (4) *Saunders* v. *Wiel* (5) was a registration for "pattern and shape." In *Le May* v. *Welch* (6), which was also cited to us, the question related to alleged novelty of shape. In the present case we have not to consider configuration or shape; and, with great respect,

(1) [1896] 2 Ch. 45.
(2) [1896] 2 Ch. 38.
(3) (1887) 14 R. 1072.
(4) 14 App. Cas. 550.
(5) [1893] 1 Q. B. 470.
(6) (1884) 28 Ch. D. 24.

I am inclined, from some passages of his judgment, to think that the learned judge has not kept this quite sufficiently in view. The novelty or originality of the plaintiffs' design is alleged to lie in the pattern or ornament. That, as it appears in the drawing annexed to the certificate of registration, consists of six panels of an engine-turned pattern in wavy lines divided from each other by deepish grooves of a narrow oval shape, and terminating at the outer end in a ring, which separates the panels from the smooth end of the curved cylindrical hand grip of the cycle handle. Is there any novelty or originality in this pattern or ornament? As I understand the evidence in the case, at the time of the plaintiffs' registration in 1898 rooved hand grips dividing the hand grip into panels were not new. It is not alleged that the outward termination of the hand grip beyond the panels by a ring and beyond that a smooth surface are new in articles of the same description. Engine-turned ornamentation in the simple form of wavy lines, or in more elaborate patterns, had before the year 1908 been in use for goods of various kinds, such as metal goods, handles of knives, and penholders and book covers. It was upon the engine-turned wavy decoration of the panels that the principal stress was laid in the plaintiffs' evidence and in the arguments of the plaintiffs' counsel. But if you find, as we do here, that such decoration of cylindrical-shaped articles, where they are gripped or held by the hand, such as knife handles and penholders, already was in use, it seems to me impossible to attribute novelty or originality to the embellishment of the cylindrical hand grip of a bicycle handle with a pattern, produced by an identical process, which, if distinguishable at all, is distinguishable only by such a slight degree of sinuosity in the wave lines as is practically in some cases imperceptible to the naked eye. Stress was laid by the plaintiffs' counsel upon the judgment of the Exchequer Chamber in *Harrison* v. *Taylor* (1), but I can find no just ground of similarity in that case to the present. In that case there was a novel combination by the designer in a cloth fabric of two old patterns—a large and a small honeycomb. It cannot, in my view, be truly asserted here that there is any new combination

(1) 4 H. & N. 815; 29 L. J. (Ex.) 3.

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in that which the present plaintiffs have registered. When it was decided in *John Harper & Co.* v. *Wright & Butler Lamp Manufacturing Co.* (1), as stated in the head-note of that case, that where a design is registered as applicable to pattern, shape, and configuration, the registration applies to the design as a whole, and it is protected although in one of those particulars it may not be novel, so that, if (to use the word adopted in the judgment of A. L. Smith L.J.) the "totality" is imitated, an actionable infringement takes place, the Court proceeded upon the basis that the novelty or originality of the design, as a combination, was established. In the present case, as I have already said, if I rightly appreciate the evidence, a panelled hand grip with grooved divisions was not new, nor was the engine turning of surfaces as an ornamentation of those surfaces new, for it had been applied to what I may, I think, fairly call the kindred surfaces of knife handles and penholders where the hand grips them. I cannot find either novelty or originality in the plaintiffs' design by reason of such a combination.

The second point is the question of infringement. Warrington J., on the first point, which I have so far been considering, said that he came to his conclusion in the plaintiffs' favour with some hesitation. Upon the second, the question of infringement, the learned judge held that the defendants' design was not merely an obvious imitation of the plaintiffs' design, but, in substance, the design itself. Now it appears to me that—if, as the plaintiffs in substance contend, their design ought to be treated as novel or original, because, in its totality, as appearing in the drawing annexed to the certificate, there is an assemblage of such details as have never been assembled before, and especially the particular shape of the grooves and the particular configuration of the wave lines on the engine-turned surface of the panels—the defendants' design, judged by the same standard, is not an imitation. The grooving alike in surface, contour, and in depth is altogether different: there are nine panels, and not, as in the defendants' design, six: the smooth termination of the hand grip beyond the ring, as the learned judge has pointed out, is deeper and wider. "The appeal," as Lord Westbury

(1) [1896] 1 Ch. 142, 154.

pointed out in *Holdsworth* v. *M'Crea* (1), quoted by Lord Watson (2), "is to the eye, and the eye alone is the judge of the identity of the two things"; and therefore I agree with Warrington J. in disregarding the small and almost imperceptible difference in the pattern of the engine-turned ornamentation. But, leaving this out of consideration, I repeat that, if, as the plaintiffs invite us to do, we are to treat the details assembled in their drawing as of real and substantial importance, the defendants' design, judged by the same standard, is redeemed by at least equally real and substantial differences from the imputation of obvious imitation.

Solicitors: *McKenna & Co.; Melville Clark.*

G. A. S.

In re DAVIES AND KENT'S CONTRACT.

[1909 D. 1643.]

Vendor and Purchaser—Title—Perpetuity—Power of Appointment—Independent Alternative Gifts—Validity of Ultimate Gift—Settled Land—Future Trust for Sale—Trustees for Purposes of Settled Land Acts—Tenants for Life Trustees—Mortgagee of Life or other Interest—Concurrence of Mortgagee—Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *s.* 2, *sub-s.* 8; *s.* 20, *sub-s.* 2, *clauses* (i.) *and* (ii.); *s.* 50—*Settled Land Act*, 1890 (53 & 54 *Vict. c.* 69), *s.* 16, *sub-s.* (ii.).

A testator devised his real estate to trustees upon trust to pay the income to his three children, and (in the events which happened) to the survivors and survivor of them for their lives, with power for any child to appoint by will a life interest to his or her wife or husband, and directed that, upon the death of the last survivor of all his children and any husband or wife to whom an appointment had been made, his trustees should sell his real estate and divide the proceeds equally between all his grandchildren then living. No appointment had been made to any husband or wife not born in the testator's lifetime.

One child died without issue, and the other two had become trustees of the will as well as tenants for life; they had sold part of the testator's estate in 1898 as tenants for life, exercising the statutory power, and had also received the purchase-money as trustees:—

Held, that the trust for sale was not bad for perpetuity, there being alternative independent gifts, on the principle stated in *In re Bowles*, [1905] 1 Ch. 371, and that, inasmuch as the power in favour of a husband

(1) (1867) L. R. 2 H. L. 380, 388. (2) 14 App. Cas. 557.

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or wife had not been exercised so as to raise any question of perpetuity, the ultimate gift to the grandchildren was, in the events which had happened, valid.

Held, also, approving and adopting *In re Jackson's Settled Estate*, [1902] 1 Ch. 258, that the tenants for life were good trustees for the purposes of the Settled Land Acts.

Where a tenant for life sells settled land by virtue of the Settled Land Acts, the exercise of the statutory power overreaches a mortgage by a remainderman, and his concurrence in the conveyance is not necessary.

In re Dickin and Kelsall's Contract, [1908] 1 Ch. 213, approved.

Observations in *In re Mundy and Roper's Contract*, [1899] 1 Ch. 275, 289, explained.

JOHN MARSHALL by his will appointed his wife, his son James Saunders Marshall, and his son-in-law Joseph William Grant trustees, and gave all his residuary estate to his trustees upon trust to pay an annuity to his wife out of the income thereof and to pay the residue of the income in equal shares to his three children, the said James Saunders Marshall, Emily Mary Jane Atkinson, and Jane Matilda Grant, until bankruptcy or alienation or during his or her life, and from and after his or her death or forfeiture to stand possessed of such shares of income in trust for his or her issue and in default of issue for the others or other of his said children and their issue, and he declared that it should be lawful for each of his said three children respectively by his or her last will and testament or any codicil thereto or any testamentary writing to nominate and appoint his or her wife or husband as the case may be to receive during her or his widowhood or widowerhood such shares as aforesaid in the stead of such appointor, and the testator proceeded "And I further direct and declare that upon the death of the last survivor of all my children and of such of their wives and husbands as under the provisions aforesaid shall have taken any interest in my estate my said trustees shall sell and convert into money the whole of my said residuary estate . . . . and I direct my said trustees to stand possessed of the net proceeds of such sale and conversion upon trust to divide the same equally between all my grandchildren who shall then be living and the issue of any of them who shall have died leaving issue the issue of any deceased grandchild to take equally amongst them their deceased parent's share only."

The testator died on December 31, 1877; Joseph William Grant died on August 25, 1883; and the testator's wife died on December 3, 1891. In 1893 James Saunders Marshall appointed his sister Jane Matilda Grant trustee of the said will in place of her husband, Joseph William Grant, jointly with himself and made a vesting declaration. Emily Mary Jane Atkinson died before the year 1898 without issue.

By an indenture dated June 13, 1898, made between James Saunders Marshall and Jane Matilda Grant of the one part and the vendor (Anne Davies) of the other part, after reciting that J. S. Marshall and J. M. Grant were beneficially entitled in possession to certain freehold houses part of the testator's residuary estate and, being trustees of the will with a future power of sale, were trustees for the purposes of the Settled Land Acts of the settlement created by the said will, and that they had as such tenants for life agreed to sell the said hereditaments to the vendor, it was witnessed that in consideration of 1350*l.* paid by the vendor to the said J. S. Marshall and J. M. Grant as such trustees they the said J. S. Marshall and J. M. Grant, in exercise of the powers in that behalf by the said Acts given to tenants for life and as beneficial owners, granted the said hereditaments unto and to the use of the vendor in fee simple.

The vendor had agreed to sell the property to the purchaser. On receiving the abstract of title the purchaser raised the objections (1.) that the same persons being tenants for life and trustees there were no proper trustees of John Marshall's will for the purposes of the Settled Land Acts; (2.) that the power given by the will to the three children to appoint their shares to their respective wives and husbands would extend to appointments in favour of wives and husbands not born in the testator's lifetime, and that the trust for sale after the deaths of such wives and husbands of the testator's children infringed the rule against perpetuities and was invalid. There were consequently no trustees to whom the purchase-money could be paid, and the conveyance to the vendor was invalid or only passed the estates of the tenants for life. (3.) The purchaser also required to know whether any of the remaindermen under the settlement made by the will had mortgaged their estates prior to 1898. This point,

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however, was not considered arguable in this Court, having regard to the decision in *In re Dickin and Kelsall's Contract.* (1)

The purchaser was not satisfied with the vendor's answers and took out this summons under the Vendor and Purchaser Act for a declaration that a good title had not been shewn.

Mrs. Atkinson had by her will, dated August 29, 1881, exercised the power of appointment in favour of her husband, Edward Atkinson, to whom she was married at the date of the testator's will. She and her husband had both died before the date of the contract. No other child of the testator had exercised the power of appointment at all.

The summons was heard before Neville J. on February 16 and 17, 1910.

Henry T. Thomson, for the purchaser. The vendor is unable to make a good title to the purchaser for two reasons. (1.) The conveyance to the vendor was made by two persons who purported to exercise the powers of tenants for life under the Settled Land Acts and also to act as trustees for the purposes of those Acts. The two positions are incompatible. The words of s. 16 of the Act of 1890, "the persons who are trustees under the settlement . . . . under a future trust for sale," might in terms include them. But by s. 2 of the same Act the Settled Land Acts, 1882 to 1889, and the Act of 1890 are to be read and construed together as one Act, and the duties of trustees under the Acts are to control the tenant for life and cannot possibly be discharged by him. See s. 26 as to approval of schemes submitted by the tenant for life for expenditure of capital money, s. 35 as to cutting timber, s. 44 as to application of either tenant for life or trustees to the Court to settle differences between them, and s. 45 as to notice to trustees. The purchaser is not protected by sub-s. 3 of s. 45, for it has been held that that sub-section does not protect a purchaser who knows that there are no trustees to whom notice can be given: *Hughes* v. *Fanagan* (2); Wolstenholme on Settled Land Acts, 9th ed. p. 401. The trustee who was also tenant for life might have to exercise the powers of the Act to sell to himself: see Settled Land Act, 1890, s. 12.

(1) [1908] 1 Ch. 213.

(2) (1891) 30 L. R. Ir. 111.

In re Jackson's Settled Estate (1) is distinguishable because the tenant for life was only one of two trustees; and it is really in favour of the purchaser, because Buckley J. said that if she ever became sole trustee another ought to be appointed.

Even if the tenants for life are good trustees for the purposes of the Settled Land Acts the trust for sale is bad, for it only arises on the death of the survivor of a class which includes the husbands and wives of children to whom an appointment has been made, and these appointees need not be born in the testator's lifetime. The power and an appointment under it would be good because the husband or wife to whom it was made must be ascertained within the life of the appointor, i.e., a life in being at the testator's death, but the gift over is bad. Farwell J. held in *In re Bowles* (2) that a gift over after a similar power was good, but that case was decided on the ground that the gift over in default of the exercise of the power was an alternative independent gift within the principle of *Monypenny* v. *Dering*. (3) But there is no authority for applying that doctrine unless the testator has severed the gifts himself. Indeed there is direct authority to the contrary: *In re Bence* (4), referring to *Proctor* v. *Bishop of Bath and Wells*. (5) The same rule is stated in Theobald on Wills, 7th ed. p. 606, and is stated by Lord St. Leonards in *Monypenny* v. *Dering* (6) itself.

[NEVILLE J. referred to *Longhead* v. *Phelps*. (7)]

There the testator had himself severed the gift. There is no possibility of finding any severance in this will.

J. K. Young, for the vendor. The first objection is covered by the decision of *In re Jackson's Settled Estate* (8), for Buckley J. clearly lays down the rule that the words of s. 16 of the Act of 1890 are conclusive where there are trustees of a settlement which contains a trust for sale, and that it is immaterial that some or one of the trustees can never exercise it.

On the second objection I admit that if there were a trust for any husband for life the gift over in the will would be void. But

(1) [1902] 1 Ch. 258.
(2) [1905] 1 Ch. 371.
(3) (1852) 2 D. M. & G. 145.
(4) [1891] 3 Ch. 242.
(5) (1794) 2 H. Bl. 358.
(6) 2 D. M. & G. 183.
(7) (1770) 2 W. Bl. 704.
(8) [1902] 1 Ch. 263.

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there is all the difference between a trust and a power. "A power is never imperative": see Farwell on Powers, 2nd ed. p. 9; *Duke of Marlborough* v. *Lord Godolphin*. (1) In applying the rule against perpetuities the Court only looks at the way the power has been exercised, not at the possible ways in which it might have been exercised. That follows from the decision of Stirling J. in *In re Abbott* (2), though that case is not precisely in point. The practice of conveyancers shews that this rule is established. The form of power in a will for a daughter to appoint an interest to an after-taken husband in Key and Elphinstone's Precedents, 9th ed. vol. ii. p. 841, is practically the same as that in this will, and the usual power given to a daughter to appoint to offspring of the marriage includes "children or remoter issue." Sometimes the words "such remoter issue to be born in the lifetime of the daughter" are added by way of reminder, but not always, and if the purchaser's construction is right the gifts over after all such powers would be void and innumerable titles would be upset. *In re Bowles* (3) decided that a gift over "subject to the trusts aforesaid" could not be construed as meaning only subject to appointments which were actually made, and there Farwell J. found an alternative limitation within the meaning of *Monypenny* v. *Dering* (4), but he mentions the distinction between a power and a limitation, and if it had not been possible to find such an alternative he would have decided the case on that distinction.

Henry T. Thomson in reply. The power to appoint to a husband on the form given in Key and Elphinstone would be good even if it were a definite trust, for he must be ascertained in the lifetime of the daughter, and the persons to take after his interest must also be then ascertained.

NEVILLE J. The point I have to consider here is a question whether a certain gift over is void for remoteness, the gift being "upon the death of the last survivor of all my children and of such of their wives and husbands as under the provisions aforesaid shall have taken any interest in my estate"; the will containing a power to the children to appoint to their

(1) (1750) 2 Ves. Sen. 61.
(2) [1893] 1 Ch. 54.
(3) [1905] 1 Ch. 371.
(4) 2 D. M. & G. 145.

wives or husbands. Undoubtedly such appointment might have been made in favour of a wife or husband who was not alive at the testator's death. There could be no objection to the power, because the power must in each case be exercised during the life of a person in existence at the date of the testator's death.

The question is as to the gift over which takes effect upon the death of persons, some of whom may be persons who were not living at the testator's death, in case the power should be exercised in their favour. If the power were exercised in favour of a person not born within the lifetime of the testator, I do not think it could have been contended that the gift over would be good.

The question is whether that makes the gift over bad in all events, or whether you have to wait and see how the power is exercised before you can ascertain whether the gift over is void for remoteness or not.

The only case which bears upon the present case is one which was decided by Farwell J., *In re Bowles* (1), and in that case he determined that a somewhat similar gift over was good. I feel, however, some difficulty in applying the doctrine of *Monypenny* v. *Dering* (2), which he applied in the case of *In re Bowles* (1), to the present case; but I think there is no decision to the effect that a gift over, dependent upon the existence of a power of appointment which may be, but has not been, exercised in such a way as to make the gift over offend against the rule against perpetuities, is necessarily bad. It seems to me, judging by the reasons that have been given by the judges in various cases—e.g., the case of *In re Abbott* (3) before Stirling J., where powers have been referred to, that the creation of a power has always been treated as a different thing from the creation of a trust, a trust not being created until the power is exercised; and the directions as to ascertaining whether a gift is good or void for perpetuity in the case of the exercise of a power have always been that the document exercising the power must be read into the will or other document creating it, so that then you have the full trusts declared by the testator or settlor. If

(1) [1905] 1 Ch. 371. (2) 2 D. M. & G. 145.
(3) [1893] 1 Ch. 54.

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that really be the true way of deciding the point, I do not see how you are to read a power into the settlement until it has been exercised. Until an appointment has been made there is nothing to go upon, and that seems to me to indicate that the real question is, not how the power might have been exercised, but how the power was exercised in the events that have happened. If that be so, the result here is that at the present time I cannot say whether the trust for sale given by the will was a good trust or whether it was not. That being so, I think that at the important time the trustees who had this fund were trustees with a future trust for sale, because there was at that time a trust which was not invalid, though subsequent events might make it so.

I think, therefore, the trustees of this will were trustees of the settlement for the purposes of the Settled Land Act.

Now comes another question, which is this: Both the trustees were tenants for life, and they were exercising their power as tenants for life. The question is whether, as they were both exercising their power as tenants for life, they could at the same time exercise their power as trustees of the settlement. It seems to me that s. 16 of the Settled Land Act of 1890 does make them trustees of the settlement for the purposes of the Settled Land Acts, and I think I am bound by that. It has been pointed out very forcibly by Mr. Thomson that the result is that the protection intended by the Legislature for the remaindermen in such a case as this is gone altogether, because the same persons are tenants for life and trustees. But I do not think I can escape from the plain words of the Act.

It is said that *In re Jackson's Settled Estate* (1) does not determine the question, because in that case there was one independent trustee to whom notice could be given, and it is settled by other cases that, although the purchaser is not affected by any invalidity in the position of the trustees of the settlement, if he knows that there are no trustees of the settlement, he knows that the provisions of the Act could not have been satisfied, and therefore he could not get a good title from the tenant for life. *In re Jackson's Settled Estate* (1) does I think in fact determine

(1) [1902] 1 Ch. 258.

the question, because in that case one of two trustees was a tenant for life, and, therefore, if "notice" means notice to a third person and cannot be given by tenants for life to themselves, then really you are in the same difficulty as you are here, because, one of the trustees of the settlement being a tenant for life, you could not give notice to these two trustees, which is the notice required under the Settled Land Act of 1882. It therefore seems to me to follow that if the sale is good where one of the trustees of the settlement is a tenant for life it must be good if both the trustees are tenants for life, and you have no independent trustee at all.

There remains the point which it is admitted has been decided by Swinfen Eady J. in *In re Dickin and Kelsall's Contract.* (1) As far as I can see that decision entirely concurs with my own opinion and I therefore follow it.

The result is that the purchaser's objections fail, and I must declare there is a good title in the vendor, and the purchaser must pay the costs of the summons.

J. R. B.

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The purchaser appealed. The appeal was heard on April 18 and 19, 1910.

At the suggestion of the Court, the objection that the gift over was void for perpetuity, so that there was no valid trust for sale, was argued first.

Henry T. Thomson, for the appellant, repeated the argument used on this point in the Court below, and also referred to and cited Gray on Perpetuities, 2nd ed. pp. 376 and 399, *Bristow* v. *Boothby* (2), and *Hole* v. *Escott.* (3)

Norton, K.C., and *J. K. Young,* for the respondent, the vendor. On the construction of this will the power of appointing a life interest was limited to a wife or husband living at the date of the will, and therefore it was only a power to appoint to an existing wife or husband, which was good. The daughters' husbands are referred to, and there is nothing to shew one way

(1) [1908] 1 Ch. 213.
(2) (1826) 2 S. & S. 465; 4 L. J. (Ch.) (O.S.) 88.
(3) (1838) 4 My. & Cr. 187.

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or the other whether the son James was or was not married; the onus is on the purchaser to shew this. The usual rule is that a gift or benefit to a wife or husband means a wife or husband existing at the date of the will: *In re Drew* (1); *In re Coley* (2); *In re Hancock.* (3)

Under the limitations of this will there was a vested interest in the grandchildren, liable to be devested to some extent by an appointment in favour of a wife or husband, and in 1898, when the sale was made, no one but the grandchildren had any vested interest, and this vested remainder was valid: Gray on Perpetuities, 2nd ed. p. 84; *Cunningham* v. *Moody* (4); *Slark* v. *Dakyns.* (5) There are therefore here two alternative independent gifts within the principle stated in *In re Bowles* (6), and inasmuch as the power was not exercised improperly the ultimate gift was good, and there were here trustees with a valid future power of sale under the Settled Land Act, 1890, s. 16, sub-s. (ii.). [In addition to the argument on this point in the Court below, counsel also referred to Fearne on Contingent Remainders, 10th ed. vol. i. p. 232, *Heron* v. *Stokes* (7), *Attorney-General* v. *Earl of Selborne* (8), and *Hancock* v. *Watson.* (9)]

Henry T. Thomson in reply. The onus is not on the purchaser to shew that the son James was unmarried at the date of the will. But even if he were married, the power was exercisable in favour of a future wife and would make the trust for sale too remote. The gift here is clearly a contingent class gift, and therefore there were no vested interests in the grandchildren as contended for by the respondent. The question of severance does not depend on the intention of the testator, but on the expressions he has used, and you cannot split the expression so as to say if the event occurs which is within the limit the estate shall go over, although if that event does not occur the gift over is void for remoteness: *Miles* v. *Harford.* (10)

(1) [1899] 1 Ch. 336.
(2) [1903] 2 Ch. 102.
(3) [1896] 2 Ch. 173, 181.
(4) (1748) 1 Ves. Sen. 174, 177.
(5) (1874) L. R. 10 Ch. 35.
(6) [1905] 1 Ch. 371.
(7) (1842) 2 D. & War. 89.
(8) [1902] 1 K. B. 388.
(9) [1902] A. C. 14.
(10) (1879) 12 Ch. D. 691, 702.

COZENS-HARDY M.R. This case has been extremely well argued by Mr. Thomson. I have considered it with care, and I have come to the conclusion that the decision of Neville J. on this point was right.

The question arises in this way: The present vendor bought the property some years ago on a conveyance by persons who purported to make a title under the Settled Land Acts. For the present purpose I assume that they were properly appointed trustees for the purposes of the Settled Land Acts. That question has to be decided hereafter. Assuming that they were trustees, then the title on this point was good.

But it is said that the title is bad because they became trustees under the Settled Land Acts only, because they were trustees for sale in a certain future event, that future event being one which is itself obnoxious on the ground of perpetuities. It has not been contended, and it could not be contended, that it would be sufficient to find in the will a trust for sale on a future event, if that future event was itself necessarily void on the ground of perpetuity. The only question for us on this part of the case is to say whether at the date this sale took place there was a trust for sale on a future event, which might or might not be a good trust for sale. If it was a future event which might or might not be good, I think the title on this point was unimpeachable. The will is undoubtedly peculiar. [Having stated the will and read the material words of the gift over, his Lordship continued.]

It will be observed on the face of this will that the testator knew that his two daughters were married, one to Mr. Atkinson and the other to Mr. Grant. The will does not say whether his son, James Saunders Marshall, had a wife then living. But the objection is taken that, under the power to give a life interest to the spouse of each of the three children of the testator, that power might be exercised in favour of a person not living at the testator's death, and, if so, that the ultimate gift in favour of a class to be ascertained only at the death of the survivor of the children, and possibly of a person not living at the testator's death, would be too remote, and the trust for sale would therefore be void. That is sought to be met in two ways. First of all,

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Mr. Norton says the power only applies for the benefit of a spouse living at the date of the will, and there is nothing to shew one way or the other that the son James was or was not married. I am not prepared to assent to that view. I think that there is sufficient in the context of this will to say that the power was one which might have been exercised in favour of the person who was a spouse of any of the three children at the date when the event happened, that is to say, when the spouse became a widow or a widower, as the case may be. On that point, therefore, I do not think that the vendor could succeed. I gather that this point was not taken before Neville J.

Now the other point is this: Assuming that the power could be exercised in favour of a spouse unborn at the death of the testator, does that necessarily involve the validity of subsequent trusts? I think not. It seems to me that this case falls within the principle laid down by Farwell J., as he then was, in *In re Bowles.* (1) It is a case in which we have not to deal with limitations made by the testator himself in this form, but we are dealing with what will be the effect of the creation under the power of a fresh interest in some unborn person. That brings the case into the class of alternative gifts, one of which may be perfectly good and the other may be distinctly bad, having regard to the rule against perpetuities. Let me read a few passages from Farwell J.'s judgment, which expresses with great clearness, and it seems to me with perfect accuracy, what is the law upon this point. There the will was in some respects very much like this will. I do not criticize the particular language of the will, but there was a power to give a life interest to husbands, and the ultimate power was in favour of a class "in trust for such of my nephews . . . . as shall be living at the time of the determination of the trusts aforesaid or the issue then living of any of my said nephews who may be then dead leaving issue"—that is to say, wait till the exercise of a power in favour of husbands and ascertain then the class to take. Farwell J. says (2) that there is first of all a limitation "to a married niece and her children, if any, and then there are limitations to three unmarried nieces and their children, with a power for the nieces to appoint to any husband whom

(1) [1905] 1 Ch. 371. (2) [1905] 1 Ch. 376.

they may marry, and who may survive them, for a life interest, or any less interest. Those husbands, of course, would not necessarily be born in the testatrix's lifetime. If, therefore, there had been, not a power to appoint to such husbands, but in each case an actual life interest given to such husbands, and the class of children to take was not to be ascertained until the death of the survivor of such niece and her husband, the gift to the class would be void for perpetuity, because the class would not be necessarily ascertainable within a life or lives in being and twenty-one years afterwards. In my opinion in the present case, if the power had been in fact exercised in favour of any such husband, the same result would have followed." He goes on to say (1): "But inasmuch as the power never was exercised, and having regard to what a power is, and what the nature of the interest created under it is, I am of opinion that this case falls within the class of cases of alternative independent gifts. The person who takes under the exercise of the power takes an executory interest in an event which may or may not happen; the testatrix has given the property to a class of persons ascertained within due limits, but she has enabled the life tenants named in her will to alter that limitation by the insertion of a life interest to a person who might be born after her death, and thus alter the period for ascertaining the class to the date of the death of the survivor of that person and herself."

It seems to me that that is the principle which ought to be applied here. If this power is not exercised in favour of a spouse born after the testator's death, no question arises. We know that the power at the date of the particular sale to the present vendors had been exercised by Mrs. Atkinson in favour of her husband. That was a perfectly unobjectionable exercise of the power. There is nothing to shew it has been exercised since. A different class of persons may take in the event of any of the powers being or not being exercised. It seems to me, therefore, that they are alternative gifts, and as in one alternative the trust is good and free from objection on the ground of perpetuities, whereas in the other event the trust would be bad on the ground of perpetuities, it is a case in which, at present, there is a future

(1) [1905] 1 Ch. 377.

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trust for sale as to which you cannot say whether it may in the event be good or bad, but, that being so, it is a case in which there were trustees of the will validly appointed who were trustees under the Settled Land Acts with a future power of sale, and able, therefore, to give a good title. For these reasons, which are substantially those urged by Neville J. in his judgment, I think on this point that the appellant's case fails.

BUCKLEY L.J. I agree. The discussion in this case has been to myself an intellectual treat, and it is Mr. Thomson who has provided the principal delicacies of the banquet. Every point, as far as I can see, has been taken and urged before the Court with a clearness which I have rarely known equalled, and it is for that reason that I am able to leave untouched such points as do not form the basis of my decision and to indicate the simple point upon which I decide this case.

This testator, after certain limited interests which are defined by the will, directed that upon the death of the last survivor of certain persons the corpus of the fund should be equally divided between all his grandchildren who should then be living. The only question on this point of the case is whether the point of time thus indicated is one which infringes the rule against perpetuities. That point of time is defined with reference to the date of the death of the last survivor of a class of persons. That class consists of all the testator's children, who were three, and possibly of more persons. Whether there will be more persons depends upon whether or not a certain power is further exercised. If it is these persons may include lives not in being at the testator's death—and the date may be the date of the dropping of the last of such lives. If it is not the date will be the date of the death of the last survivor of the three children. The persons to take will therefore differ according as the power is or is not further exercised. It seems to me that that results in alternative independent gifts. If the power is not further exercised, the gift is to grandchildren living at the death of the survivor of the three children of the testator and of Mr. Atkinson. That is perfectly good. If the power is further exercised, then it is a gift to a class of persons who may have to be ascertained in breach

of the rule against perpetuities. The power has not been exercised in that way and one of the two alternative independent gifts is valid. This being so, the appeal I think fails.

KENNEDY L.J. I am of the same opinion and I have very little to add. I desire to express no opinion upon the question of construction, whether under the terms of the will itself the power was exercisable in favour of a spouse unborn at the date of the testator's death. I will assume that the answer to that question should be an answer which favours the argument of the appellant. With regard to the main question, in spite of the very able argument of Mr. Thomson, it seems to me that the view presented by the respondent's counsel is the more correct. It is a view which I think is borne out to a large extent by the passage cited from Fearne on Contingent Remainders, and it is the view which is approved by Farwell J. in the judgment in *In re Bowles* (1), which is a recent judgment with which I desire to express my concurrence, the distinction, as I understand it, being a distinction which the argument for the appellant has not sufficiently observed, the distinction between a prior limitation which is void with the gift over, where the fact of prior limitation has the effect of destroying the subsequent gift, and that, which is the case here, of a vested gift over subject to the exercise of a power, which may if exercised in a particular way, and only if exercised in a particular way, make the gift over bad. In other words, I think that if you follow that distinction, which seems a sound and established distinction, you have in this case, as Farwell J. had in *In re Bowles* (1), a case which falls within the class of alternative independent gifts, and therefore this gift over is good.

Henry T. Thomson repeated the argument used in the Court below with reference to the objection that the trustees being the same persons as the tenants for life were not trustees for the purposes of the Settled Land Acts.

Norton, K.C., and *J. K. Young* were not called upon.

COZENS-HARDY M.R. I entertain no doubt that the appointment of a tenant for life as a trustee for the purposes of the

(1) [1905] 1 Ch. 371.

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Settled Land Acts is most inexpedient and undesirable; and the Court in more than one reported case has for that reason declined to appoint the solicitor of a tenant for life a trustee for the purposes of the Settled Land Acts, but that is quite different from the present contention that if such an appointment has been made it is invalid and one which can have no legal effect. I decline to take the view that the trustees of this will, who were appointed in 1893, and so far as I can gather in the ordinary course with the intention that they should discharge the ordinary duties of trustees, although trustees for all other purposes of the will, are not to be deemed trustees for the purposes of the Settled Land Acts, simply because one or all of them are interested as tenants for life or are persons having the powers of a tenant for life. I think the judgment of Buckley J. in *In re Jackson's Settled Estate* (1) really covers this point. He puts this question as a question of expediency, and merely a question of expediency, and it would be wrong for us to lay down a hard and fast rule that the mere fact that one of the trustees of the will, in whom a power of sale is vested, is a tenant for life is any objection. That is the neat point that was raised before Buckley J.; and I go further and say that even if all the trustees are tenants in common for life, or have the powers of tenants in common for life, the same principle applies. The appointment is undesirable, but nevertheless it is not invalid. I think this objection to the purchase fails.

Buckley L.J. Under the scheme of the Settled Land Act, 1882, the trustees for the purposes of the Acts are there to watch the tenant for life, and to control, in the interests of the persons other than the tenant for life, the acts which the tenant for life does. For that reason it is not expedient that a tenant for life should be a trustee for the purposes of the Act. But that is not the question here. The question is whether the Act has provided that tenants for life shall not be trustees for the purposes of the Settled Land Acts. To my mind it has not. For instance, under s. 2, sub-s. 8, of the Act of 1882, the settlor could, if he was so minded, create a tenant for life

(1) [1902] 1 Ch. 258.

and provide that the tenant for life should be the sole trustee for the purposes of the Settled Land Acts. When the tenant for life gives notice pursuant to s. 45, sub-s. 1, there is no necessity that there should be two trustees, if a contrary intention is expressed in the settlement: see s. 45, sub-s. 2. The Act is therefore so framed as that it will be possible that the tenant for life should be sole trustee for the purposes of the Settled Land Acts. That being so, it is obvious that the Act cannot have provided, expressly or by implication, that a tenant for life shall not be a trustee for the purposes of the Settled Land Acts. It is, however, quite another thing to say that if the tenant for life is sole trustee, or if two tenants for life are sole trustees of the settlement, the remaindermen are without protection. As I said in *In re Jackson's Settled Estate* (1), it would be competent for the remaindermen to apply to the Court to shew that the tenant for life is so placed as that he ought to be controlled by others who shall act with him. If the sale were being made under such circumstances as that there was nobody to check the matter in the interests of the remaindermen, I have no doubt that the Court would immediately entertain an application to control the proceedings of the tenant for life. That is the safety which is afforded by the Act of Parliament against the improper use of the Act of Parliament. But I cannot find anything in the Act which shews that the tenant for life cannot be a trustee for the purposes of the Settled Land Acts, and that is really the whole of the present point.

KENNEDY L.J. I agree.

Henry T. Thomson. The purchaser is entitled to know whether any of the remaindermen had mortgaged their estate or interest prior to 1898, because, if so, according to the opinion expressed in Williams on Vendor and Purchaser, pp. 323, 324, based upon the observations in *In re Mundy and Roper's Contract* (2), the tenant for life had no power to convey free from such incumbrances. On this point *In re Dickin and Kelsall's Contract* (3) is wrongly decided.

(1) [1902] 1 Ch. 258. (2) [1899] 1 Ch. 275, 289.
(3) [1908] 1 Ch. 213.

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[COZENS-HARDY M.R. referred to s. 50 of the Settled Land Act, 1882.]

Having regard to the word "other" in clause (ii.) of s. 20, sub-s. 2, of the Act of 1882, it seems that clause (i.) and clause (ii.) ought to be read together, and there is nothing to limit clause (ii.) to charges arising under the settlement; clause (i.) refers to charges created before the settlement, and clause (ii.) to independent charges, or settlement charges for securing money actually raised. The conveyance is therefore made "subject to" the paramount charges of clause (i.) and "subject to and with the exception of" the subsequent and independent settlement charges of clause (ii.).

In *In re Sebright's Settled Estates* (1) North J. expressed the opinion that a mortgage by the tenant for life fell within clause (ii.). The observation in *In re Mundy and Roper's Contract* (2), that "Mortgagees who have actually lent their money on the security of the land are regarded as strangers to the settlement, and are not to have the security which they bargained for on the land itself transferred to the purchase-money at the will of the tenant for life," is strongly in favour of the purchaser's contention and justifies the construction placed on those sub-sections in Williams on Vendor and Purchaser, pp. 323, 324.

Norton, K.C., and *J. K. Young*, for the respondent. Sect. 20, sub-s. 2, is reasonably clear, clause (i.) is probably mere surplusage, and clause (ii.) refers to things ejusdem generis with those given in clause (i.); the word "other" points to the fact that they are to be ejusdem generis with estates, &c., having priority to the settlement.

It has never been the practice of conveyancers to inquire whether remaindermen have incumbered their interests; if such an inquiry were made the tenant for life could not answer it. The conveyance under the statutory power overreaches a sale by a remainderman though made before the sale and even before the Act—*Wheelwright* v. *Walker* (3)—and the same principle has always been held by conveyancers to apply to a mortgage by a remainderman: Wolstenholme on the Conveyancing Act

(1) (1886) 33 Ch. D. 429, 438. (2) [1899] 1 Ch. 275, 289.
(3) (1883) 23 Ch. D. 752.

and Settled Land Acts, 7th ed. p. 321; and Mr. Challis in the last edition of Hood and Challis on the Conveyancing and Settled Land Acts, which he edited (1898, 5th ed.), in enumerating the estates in s. 20, sub-s. 2, clause (ii.), which are not overreached by the conveyance by the tenant for life, only mentions charges created under the powers of the statute or of the settlement which affect the land and are consequently ejusdem generis with those mentioned in s. 20, sub-s. 2, clause (i.). The passage relied on in *In re Mundy and Roper's Contract* (1) refers to charges on the land as distinguished from some one's interest in the land, and this is consistent with the judgment of Chitty J. in *Cardigan* v. *Curzon-Howe*. (2)

Henry T. Thomson in reply.

COZENS-HARDY M.R. This third point also raises a question of great importance, but in my view not of great difficulty.

I approach this Act with the knowledge that the intention of the Legislature was to make settled land saleable, and in cases of any doubt I think one is entitled to have regard to what is the general policy of the Act. The Act contemplates on its face that you may have a tenant for life of an estate which is subject to a mortgage. I say that, because one of the courses of dealing with the purchase-moneys is to pay off incumbrances on other parts of the estate. One's knowledge of real property law and the statutes connected with it shews one that powers to raise portions and to raise other sums are habitually inserted in settlements, and also that there are provisions under the Copyhold Acts and various other Acts under which a charge may be made by statutory authority upon the corpus of the settled estate; and the settlement may not only be a settlement of an equity of redemption subject to a mortgage, but it may be also a settlement of a reversion or remainder in fee subject to an outstanding life interest. That being so, we come to the critical section, sub-s. 1 of s. 20 of the Act of 1882. It has already been enacted by s. 3 that the tenant for life may sell, exchange, partition, lease, mortgage, or charge the estate, and s. 20, sub-s. 1, says that on a sale a

(1) [1899] 1 Ch. 275, 289. (2) (1888) 40 Ch. D. 338, 342.

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tenant for life may, as regards land sold or intended to be sold, "convey or create the same by deed, for the estate or interest the subject of the settlement, or for any less estate or interest"; that is to say, if the subject of the settlement is an equity of redemption, the tenant for life can only sell the equity of redemption. If he has the fee, subject to a charge or not, and is minded to grant a lease under one of the leasing powers, he can by his deed create an estate for less interest than the fee he has in it, but under no circumstances can he sell or deal with, under the Act, anything more than the estate or interest the subject of the settlement, or for any less estate or interest, and he may "convey it to the uses, and in the manner requisite for giving effect to the sale." That is the statutory power of sale given to the tenant for life. Then we come to sub-s. 2, which says: "Such a deed, to the extent and in the manner to and in which it is expressed or intended to operate and can operate under this Act,"—those limits are those I have indicated in dealing with sub-s. 1—"is effectual to pass the land conveyed, or the easements, rights, or privileges created, discharged from all the limitations, powers, and provisions of the settlement, and from all estates, interests, and charges subsisting or to arise thereunder, but subject to and with the exception of" certain things which I am now coming to; that is to say, the tenant for life may convey that which is the estate subject to the settlement. He may convey it, in order to give effect to this sale, "discharged from all the limitations, powers, and provisions of the settlement, and from all estates, interests, and charges subsisting or to arise thereunder." Then it is subject to certain exceptions as follows. Clause (i.): "All estates, interests, and charges having priority to the settlement." Those words seem to me to be inserted for caution, but not to add anything to the enacting part, because the power to sell is only that which is the subject of the settlement, and excludes any prior charge. It is very reasonable and very right to insert any words which might remove any possibility of doubt as to the power of the tenant for life to interfere with estates and interests and charges prior to the settlement. Then comes clause (ii.): "All such other, if any, estates, interests, and charges as have been conveyed or

created for securing money actually raised at the date of the deed." In one view that means simply all such other estates, interests, and charges as exist on the land itself, as distinguished from any estate of any beneficiary in the land; and the other view is that it is an exception of any mortgage for value, money actually raised either by the tenant for life, or by any of the numberless remaindermen who may be found under an old-fashioned lengthy family settlement. If the latter view is right, this Act, which was intended to make land saleable, would entirely fail. No title could be made because the tenant for life is not in a position to know what incumbrances have been created by the persons in remainder. I think that cannot be the view. I am influenced in that partly by s. 50, which in terms renders it unnecessary for a mortgagee of the tenant for life's own interest to convey property. The mortgagee of the tenant for life's interest is in the same position as an assignee out and out. His consent has to be obtained, but he is not a conveying party. His consent is required for the obvious reason that a person in whom a power is vested cannot derogate from his own grant without the consent of the persons who might be affected by the exercise of the power.

In my opinion the true construction of these words is that which is indicated by Chitty J. in *Cardigan* v. *Curzon-Howe*. (1) He says (2): "If a remainderman and tenant in fee mortgage, that is not a mortgage which subsists or arises under the settlement. The charge arises only because a person who has an interest under the settlement, as the holder of any other interest, can assign it or mortgage it; and, by parity of reasoning, I am disposed to think that that would also be the right view with reference to a mortgage created by the tenant for life mortgaging his own life interest. But that, again, would not be an estate, interest, or charge subsisting, arising, or to arise under the settlement; it would be a mortgage made by a man who is the owner of the life estate and is entitled to deal with it as he thinks fit." It is said that that is inconsistent with what Chitty L.J. said in *In re Mundy and Roper's Contract* (3)

(1) 40 Ch. D. 338. (2) 40 Ch. D. 343.
(3) [1899] 1 Ch. 275.

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when delivering the judgment of himself and Lindley M.R. I do not so understand *In re Mundy and Roper's Contract.* (1) It was a very complicated case which did not directly give rise to this point. It ultimately turned upon the question whether there was or was not what is known as a compound settlement, and if there was a compound settlement, as the Court of Appeal held there was, the tenant for life could override and overreach certain jointures and powers of raising portions which otherwise he could not have overreached. No money had been raised under those powers in point of fact, and Chitty L.J. said this, after referring to s. 20, sub-s. 2 (2): "The second" exception "is important, as shewing an express restriction on the power of the tenant for life. We find in it a principle. Mortgagees who have actually lent their money on the security of the land are regarded as strangers to the settlement, and are not to have the security which they bargained for on the land itself transferred to the purchase-money at the will of the tenant for life . . . . The exception in sub-s. 2 (ii.) of the 20th section has, however, no direct application to the present case, because no money has been raised under the jointure term or the portions." That was the only thing to which the observation was addressed. That makes his judgment consistent with what he said in *Cardigan* v. *Curzon-Howe* (3), and that makes the judgment consistent with what in my view is the policy and, I was going to say, the plain intent and meaning of the statute. It is, moreover, consistent with the settled practice of conveyancers for the last twenty-eight years, and I think it would be little short of a disaster if the Court of Appeal allowed any doubt to be expressed upon the power of a tenant for life with the consent of his own incumbrancers (under s. 50) to sell and make a good title without reference to any incumbrances executed by persons entitled in remainder under the settlement. I think, therefore, that Swinfen Eady J., from whose decision in *In re Dickin and Kelsall's Contract* (4) this in substance is an appeal, was right in the conclusion he arrived at, and that that decision ought to be followed, and this appeal dismissed on this point also.

(1) [1899] 1 Ch. 275.
(2) [1899] 1 Ch. 289.
(3) 40 Ch. D. 338.
(4) [1908] 1 Ch. 213.

BUCKLEY L.J. A tenant for life has, under the Settled Land Acts, power to dispose of and convey that which is not his, but his powers in this respect are not without their limits. The limit is expressed in s. 20, sub-s. 1, of the Act of 1882 by the words "for the estate or interest the subject of the settlement." He may convey the land for that estate or any less estate, but more than that he cannot do. Therefore when you come to sub-s. 2 of s. 20 you find that the deed executed by the tenant for life to the extent to which it can operate under the Act—that is, the extent of conveying as a maximum the estate or interest the subject of the settlement—is effectual to pass the land. But it can do no more. It does not pass every estate in the land; it can only at the most pass such estate in the land as is the subject of the settlement. It is effectual to pass that or the easements, rights, or privileges created. Then follow these words: "discharged from all the limitations, powers, and provisions of the settlement, and from all estates, interests, and charges subsisting or to arise thereunder, but subject to and with the exception of"—and then follows clause (i.)—"all estates, interests, and charges having priority to the settlement." Having regard to what I have already said, those words are pure surplusage, they effect nothing. There had been no power given to the tenant for life to do more than sell and convey the land for the estate and interest the subject of the settlement, and therefore to say that he could not convey discharged from estates having priority to the settlement was of no effect, and that clause is purely otiose. Then comes clause (ii.), upon which the question arises: "All such other, if any, estates, interests, and charges as have been conveyed or created for securing money actually raised at the date of the deed." Upon that clause the question is whether that means estates, and so on, for securing money which owe their existence to some provision contained in the settlement or to some statute which operates upon the estates and interests in the settlement—for instance this Act—or whether it extends to incumbrances created by beneficiaries deriving title under the settlement. Before going on to say what I think as to that I will read clause (iii.): "All leases and grants at fee-farm rents or

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otherwise, and all grants of easements, rights of common, or other rights or privileges granted or made for value in money or money's worth, or agreed so to be, before the date of the deed, by the tenant for life, or by any of his predecessors in title, or by any trustees for him or them, under the settlement, or under any statutory power, or being otherwise binding on the successors in title of the tenant for life." It is to be noticed that clause (iii.) deals with a number of cases, but they are all cases of estates or rights granted under the settlement or under some statutory power. That is what follows clause (ii.). These clauses are prefaced by the words "subject to and with the exception of." Swinfen Eady J. in *In re Dickin and Kelsall's Contract* (1), seeing the difficulty as regards the first clause, "estates having priority to the settlement," expresses the opinion that the words "subject to" refer to and govern clause (i.) and the words "with the exception of" refer to and govern clauses (ii.) and (iii.). It is quite true that you cannot read "with the exception of" as applying to clause (i.), because estates having priority to the settlement can never be the subject of exception from estates under the settlement. I suppose it is for that reason that he endeavoured to establish that distinction. I do not myself dwell upon that. It seems to me that when I have to do with clause (ii.) I have to read all the words "subject to and with the exception of" as governing clause (ii.), and that the thing mentioned in clause (ii.) must be a thing within the words "with the exception of" or, as I prefer to put it, must be something which satisfies both the words "subject to" and the words "with the exception of." You cannot, as regards clause (ii.), escape the words "with the exception of." If then the thing mentioned in clause (ii.) is a thing which must satisfy the condition that it is capable of being excepted from that which precedes, it follows that the estate, interest, and charge mentioned in clause (ii.) must be within the words "all estates, interests, and charges subsisting or to arise thereunder," because it is an exception therefrom. Upon that ground it seems to me that which is mentioned in clause (ii.) does not extend to mortgages or charges created by beneficiaries

(1) [1908] 1 Ch. 213.

under the settlement. To have arrived at the contrary conclusion would appear to me to make the Act unworkable. The tenant for life who is selling cannot ascertain, or cannot practically ascertain, from the beneficiaries entitled in remainder whether they have incumbered their shares or not. If he asked them they might say that they were not going to tell him. The result would be that a tenant for life who was going to sell would either have to protect himself by a condition that the purchaser must take subject to such charges, if any, in which case one can scarcely suppose he would find a purchaser, or would have to expose himself to consequences if he took upon himself to assert towards his purchaser that there were no such incumbrances. Practically the tenant for life could never sell. The difficulty that confronts one is upon the words in *In re Mundy and Roper's Contract* (1) used by Chitty L.J. In reading those words I have great difficulty in saying that the mortgagees there spoken of are not or do not include mortgagees deriving title under beneficiaries. In two succeeding sentences Chitty L.J. speaks of (1.) mortgagees and (2.) assignees of the estate of the tenant for life and says that as to the latter the same principle is maintained as had been adopted for the former. But it is possible to read the words the other way. The mortgagees may mean mortgagees who have lent money on the security of the land under some authority which derives its efficacy from the provisions of the settlement. If read in that way there is no difficulty, and even if read the other way the words in question are not words which form the basis of the decision in *In re Mundy and Roper's Contract.* (1) They are mere dicta, and although dicta to which I should pay high regard, I do not think they ought to influence me in determining the question in a way different from the conclusion at which I have arrived. I think the appeal fails upon this point also.

Kennedy L.J. I entirely agree and have nothing to add to the judgment which has just been delivered.

Solicitors: *Snow, Fox & Higginson; Lewis Margetts & Co.*

(1) [1899] 1 Ch. 275, 289.

W. C. D

FARWELL J.

1902

May 1.

In re SPARROW AND JAMES' CONTRACT. (1)

[1902 S. 695.]

Vendor and Purchaser—Form of Conveyance—Parcels—Description by Reference to Plan—Restrictive Words—Right of Vendor to insert.

Land was put up for sale by auction under particulars and conditions to which a plan was attached. The plan was a copy of the ordnance map, and upon it was a printed statement to the effect that it was for reference only, and that there was no guarantee of its accuracy, but that it was believed to be accurate. The draft conveyance described the property by reference to a plan, which was a copy of the plan attached to the particulars and conditions. The vendor proposed to insert the words "by way of elucidation and not of warranty," to qualify the reference to the plan:—

Held, that he was not entitled to do so, as the description of the property in the draft conveyance was insufficient or unsatisfactory without reference to the plan, in which no material error could be pointed out.

In December, 1901, the vendor offered 220 acres of land for sale by auction under printed particulars and conditions to which a plan was attached. This plan was a copy of the map published by the Ordnance Survey, and upon it was a printed statement to the effect that the plan was for reference only; that there was no guarantee that it was accurate in any particular, but that it was believed to be accurate. There was no express provision in the conditions as to the form of the conveyance.

The purchaser submitted a draft conveyance in which the property was described in general terms with the following addition: "which said premises are more particularly described in the first schedule hereunder written, and, with their respective quantities and boundaries, are delineated or shown on the plan drawn on the back of these presents, and therein surrounded by a red verge line." The vendor proposed to insert the words

(1) We owe the present report of this case, which in *In re Sansom and Narbeth's Contract*, [1910] 1 Ch. 741, 743, 747, could be referred to only from incomplete materials, to the kindness of Mr. A. E. Randall, of Lincoln's Inn, who was at the time on the staff of the *Law Journal* reports.

"by way of elucidation and not of warranty" between the words "boundaries, are" and the words "delineated or shown." The purchaser disputed the vendor's right to insert these words.

This was a summons under the Vendor and Purchaser Act, 1874, to have it determined whether the words should be inserted or not.

Upjohn, K.C., and *Cruickshank*, for the purchaser. The description without a reference to the plan is insufficient. "Where it is simply a question of convenience to the purchaser, not involving any matter of substance affecting the vendor, it is idle for the vendor to raise objections to the form of the conveyance": per Wood V.-C., *Cooper* v. *Cartwright*. (1) This is apparently Dart's authority for his more general statement (Vendors and Purchasers, 6th ed. at p. 572), "it is conceived that (subject to the question of expense) a purchaser may insist on taking his conveyance in the form most convenient to himself, provided the vendor is not thereby prejudiced."

Mr. Brickdale's opinion (2) is read as part of the argument on behalf of the purchaser. The general practice of conveyancers favours a conveyance by reference to a plan: Davidson on Conveyancing, 4th ed. vol. i. p. 85; Dart on Vendors and Purchasers, 6th ed. p. 600. Key and Elphinstone's Precedents, 6th ed., tit. "Parcels," contains several forms in which there is a reference to a plan. In the Land Registry the conveyance is always by reference to a plan.

[FARWELL J. My impression is that it was customary to insert "but not restrictive of the generality of the foregoing description," where the conveyance was by reference to a plan. But there is the question whether the purchaser is entitled as of right to have a description by plan, as well as a description in words.]

It is not sought to bind the vendor to the accuracy of the plan annexed to the particulars and conditions, but it must be considered as prima facie correct. The plan on the conveyance, which will be a copy of that plan, stands on the same footing. So far as the plan can be shewn to be inaccurate or misleading,

(1) (1860) John. 679, 685. (2) See [1910] 1 Ch. 747.

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the vendor is entitled to have it amended. The present objection is unsubstantial.

T. L. Wilkinson, for the vendor. There is no authority entitling the purchaser to a double description, one by plan and the other by descriptive words. It is not known to the vendor, or to his advisers, whether the sale plan is accurate or not. It was prepared from the ordnance map, and is believed to be accurate, but if inaccurate the vendor might suffer some prejudice: *Lyle* v. *Richards*. (1) Dart points out the danger which a vendor incurs by reason of an inaccurate plan: Dart on Vendors and Purchasers, 4th ed. p. 110. In the Land Registry the plan is checked by officials. If a plan is prepared according to a new survey, the cost will be considerable, as the property covers 220 acres. The purchaser is seeking to bind the vendor to the strict accuracy of a plan, which is contrary to the terms of the contract.

Upjohn, K.C., in reply. The passage cited from Dart only refers to the effect of an inaccurate plan on a contract. After conveyance the only remedy is on the covenants for title. There is no sufficient description without reference to a plan. The accuracy of the sale plan is not challenged in any particular by the vendor, who obviously has no doubt that it is substantially accurate.

FARWELL J. I think it is unnecessary to determine the general question, whether the purchaser is entitled in all cases to have a description of the property conveyed by reference to a plan. The case which I have to determine is one in which there is a description which, without a plan, is insufficient, or, if not insufficient, unsatisfactory, and which does not fulfil the duty cast upon the vendor, who knows, while the purchaser does not, the property, to describe the property conveyed with reasonable certainty. It is the duty of the vendor to make himself acquainted with the property, and its limits and bounds. If he puts in a description which is sufficient without reference to a plan, that may be enough. In my opinion, taking the description of the property apart from any plan, and striking out all

(1) (1866) L. R. 1 H. L. 222.

reference to the plan, there is not a description of such precision as the purchaser is entitled to require. Of late years, as Mr. Dart points out, it is becoming more common to convey by reference to a plan, and it is convenient to do so in most cases.

It is said that the reference to the plan is qualified by the statement that it was intended for reference only, and that its accuracy was not guaranteed. That, in my opinion, only refers to the contract. It may be that the purchaser might have objected to complete upon the ground that the plan was not accurate. I think it was intended by that clause to preclude that objection, and to permit the vendor to correct the plan upon proper evidence, if he desired to do so. The vendor knows what deeds he has, and the title in himself, and he is bound to convey by a sufficient description according to the title shewn. I am not aware of any decision which shews that a plan on a conveyance amounts to a warranty that the plan is accurate. (1)

In my opinion the purchaser is entitled, in this particular case, to have a plan, in order to supplement the general description in the draft conveyance.

Solicitors: *Schultz & Son, for Gwilym James, Charles & Davies, Merthyr Tydfil; W. R. Smith & Smyth, for Gardners, Abergavenny.*

(1) See *Horne* v. *Struben*, [1902] A. C. 454; *Mellor* v. *Walmesley*, [1905] 2 Ch. 164.

SWINFEN EADY J.

1910

April 29.

In re AKTIEBOLAGET B. A. F. HJORTH & CO.'S TRADE MARK "PRIMUS."

Trade Mark—Registration—Special Application — Distinctive Word—User—Foreign Language—Trade Marks Act, 1905 (5 *Edw.* 7, *c.* 15), *s.* 9, *sub-s.* 5—*Practice—Form of Order.*

A Latin word will not necessarily be refused registration as a trade mark because its English equivalent could not be registered. It may be registered if it has not become a part of the English language and has become distinctive of the applicants' goods by long user and there is no danger of confusion or inconvenience to other traders. When an application is referred by the Board of Trade to the Court under s. 9, sub-s. 5, of the Act of 1905, the Court will not make any declaration that the proposed mark is or may be distinctive, but will only direct the registrar to accept the application in order that it may be proceeded with in the ordinary way.

THIS was an application (No. 312,277) by a Swedish company for the registration in England of the word "Primus" as a trade mark in class 18, for stoves. The application was made under s. 9, sub-s. 5, of the Trade Marks Act, 1905, and the registrar had referred the application to the Court. The evidence shewed that the applicants had done considerable business since 1893 in England in wickless paraffin stoves marked with the word "Primus" as a trade mark, and the registrar admitted that they had proved prima facie that the word "Primus" had come to signify stoves of the applicants' manufacture. At the date of the application there was a trade mark "British Primus" on the register in class 18 (which includes stoves), but this had been removed from the register on the applicants' motion before the hearing of this application in Court.

Walter, *K.C.*, and *Sebastian*, for the application. It is admitted that this word "Primus" has long been used by the applicants as a trade mark and has come to denote the applicants' goods.

It is within the definition of trade mark in s. 3 of the Trade Marks Act, 1905. Sect. 9 of that Act defines what is a registrable trade mark. It might have been registered under s. 9, sub-s. 4, for it has no direct reference to quality, but the application is made under sub-s. 5, which enables the Court to look at

user. The section was thoroughly considered in *In re Joseph Crosfield & Sons* and the *California Fig Syrup Case*, which were heard together. (1) The effect of the judgments of the Court of Appeal in those cases is that the Court will not permit the registration of a merely laudatory word; but if the word is not merely laudatory the only question for the Court is whether the mark, if registered, is likely to cause confusion or inconvenience to other traders. The word "Primus" is not a merely laudatory word, it is not used in England as a laudatory word at all, and there is no possibility of confusion or inconvenience to other traders. The fact of the word having a meaning in Latin is no objection. There are many Greek and Latin words on the register, e.g., "Ariston," "Perfecta," "Ovum."

Sargant, for the Board of Trade. We admit that the applicants have made out a prima facie case that the proposed mark has come to signify goods of their manufacture. It is now within the power of the Court to register these marks, so the old authorities are not binding, but the Court has a discretion, and it should be exercised upon the lines laid down by Lord Herschell's Committee. "We think that where any English word would be rejected as not entitled to registration, no person ought to be permitted to register its translation into any other language": Kerly on Trade Marks, 3rd ed. p. 144. The word "Primus" must have been selected to express the quality of the goods and is perfectly familiar to every Englishman who has any education. The cases of *In re Sanitas Co.'s Trade Mark* (2), *Hodgson* v. *Sinclair* (Britannia mark) (3), and the *Diabolo Case*, *Philippart* v. *William Whiteley, Ld.* (4), though under the earlier Acts, establish the general principle that the Courts will not register as a trade mark a word which is part of the common stock of language though not English.

Walter, K.C., in reply.

SWINFEN EADY J. In this case the applicants Aktiebolaget Hjorth & Co. are a Swedish company, and they have applied to

(1) [1910] 1 Ch. 130.
(2) (1887) 4 Rep. Pat. Cas. 533.
(3) (1891) 9 Rep. Pat. Cas. 22.
(4) [1908] 2 Ch. 274; 25 Rep. Pat. Cas. 565.

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register in class 18 as a trade mark the word "Primus." They have used it in connection with stoves, and class 18 includes warming apparatus.

This is an application that the registrar may be directed to proceed with their application. I am not now upon the question whether it ought to be registered or not, but whether their application should be proceeded with. It appears from the evidence that this Swedish company since the year 1893, that is, for some seventeen years, have done a large trade in this country in the stoves in question. They have been imported into and sold in this country and have been distinguished by the mark "Primus," which has been used by the applicants down to this date and is still being used. It is said that there is a large and increasing trade in Primus stoves, and that the applicants have expended considerable sums in advertising the stoves, and that as a result the stoves are well known in this country as Primus stoves, and that persons ordering a Primus stove would mean a stove of the applicants' manufacture. On behalf of the registrar that is not disputed. It is conceded that the applicants have made out a prima facie case that by user of some seventeen years in this country the word Primus has become distinctive of their stoves and of theirs alone. It does not appear, so far as the evidence goes, that there are any other stoves, or any other goods of any sort or kind, in the market with that name. The advertisement has not yet appeared, and it is possible that after the application has been advertised a different state of things may be disclosed; but, dealing with the evidence as it stands, I am of opinion that the applicants have made out a strong case, that their goods are known under the mark which they seek to register, and that there has been such a user of the mark upon their goods as to render it distinctive. The application is under sub-s. 5, and that involves the concession that it is a mark which does not come within sub-s. 4 of s. 9 of the Act. Otherwise there would be no necessity for application to the Court or to the Board of Trade with reference to it. Under sub-s. 4 of s. 9 a registrable trade mark may be a word or words having no direct reference to the character or quality of the goods, and if this word has no

direct reference to the character or quality of the goods, then it would come within that sub-section. It cannot, however, be said that it has no direct reference to the character or quality of the goods. It is a Latin word, that is, a word in a dead language, and it is a word which has not become, as many Latin words have become, an ordinary English word. For instance, in the *Britannia Case* (1), Chitty J. said, speaking of the word "Britannia," "Notwithstanding its Latin form it may be said that it has been adopted and naturalized as an ordinary English word." That cannot be said of the word "Primus"; and, so far as I can judge from the present materials, no difficulty or confusion with the goods of other traders is likely to be caused by its registration. It cannot be said that it is a word frequently used with reference to goods, advertisements, or notices, as is the case with many foreign words. In the recent case of *In re Joseph Crosfield & Sons* (2) several tests were suggested by members of the Court of Appeal as matters to be considered on an application of this kind, and the Master of the Rolls, after pointing out that the protection against attempts to appropriate words is furnished by sub-s. 5, requiring a preliminary order of the Board of Trade, or of the Court, said: "The duty of the tribunal is not to declare that the mark ought to be registered, but only to give liberty to proceed with the application. Such liberty ought to be given when there is a sufficient prima facie case made out. And whenever there had been long-continued and extensive user as a trade mark, that circumstance should, in ordinary cases, suffice to establish a right to proceed." In my opinion, in the present case there certainly has been long-continued and extensive user of this mark as a trade mark. Then a little later in his judgment he said (3): "If it is open to doubt, the tribunal may direct the application to proceed." Fletcher Moulton L.J. said that (4), in cases of this description, "The Court will therefore do well to ask itself the question, Will the registration of the trade mark cause substantial difficulty or confusion in view of these rights of user by other traders? If the answer is in the affirmative, the Court

(1) 9 Rep. Pat. Cas. 24.
(2) [1910] 1 Ch. 130, 141.
(3) [1910] 1 Ch. 142.
(4) [1910] 1 Ch. 148.

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will probably hesitate to allow the word to be registered. But if the answer be in the negative, either by reason of the nature of the words, or because a past user has limited the possibility of other traders safely or honestly using the words, the Court may well grant the desired permission."

Again applying that test, I am of opinion that upon the present material no substantial difficulty or confusion with reference to the goods of other traders is likely to arise by allowing this word to be used. It is a material fact that the word which it is sought to register is a word of a dead language, and not a word in use as part of the language of the day in any country.

I direct the registrar to proceed with the application.

There was some discussion as to the form of the order to be made in this and similar applications under s. 9, sub-s. 5, of the Act. Sargant asked for an order in the form "The Board of Trade, or the Court, being of opinion that on the evidence before them the mark ought to be deemed a distinctive word within s. 9, sub-s. 5, of the Act, directs that the application be accepted and the registrar proceed," which he said had been suggested by the law officers; but Swinfen Eady J. said that that form went too far: it was not intended that the Court should determine at this stage that the word was a distinctive mark, and the order must merely direct that "the registrar accept the application." In *In re California Fig Syrup Co.* the Master of the Rolls said (1): "It is not for us to say at this stage that the mark is distinctive." It appeared to him that a further order of the Board of Trade would be necessary before the mark could be registered, but if there were no opposition it would be merely a pro forma order.

Solicitors: *McKenna & Co.; Solicitor to the Board of Trade.*

(1) [1910] 1 Ch. 143.

J. R. B.

SWINFEN EADY J.

1910

May 5.

In re BOXER. MORRIS *v.* WOORE.

[1910 B. 1183.]

Will—Probate Duty—Direction to pay out of Specific Fund—Will made before Finance Act, 1894 (57 & 58 *Vict. c.* 30)—*Death after Act—Estate Duty.*

By her will, dated August 20, 1888, when probate duty was in force, a testatrix bequeathed certain Consols to her trustees upon trust for her brother for life and subject thereto upon trust to raise thereout "the amount of the probate duty which may be payable on the proving of this my will in respect of the said Government Consolidated Annuities," the said sum when raised to fall into residue.

The balance of the Consols was given to certain specific legatees.

The testatrix died on August 19, 1896, after the commencement of the Finance Act, 1894, so that estate duty and not probate duty was payable.

The brother died on November 15, 1909, and the Consols became divisible:—

Held, that the direction to raise probate duty did not operate as a direction to raise the larger and widely different estate duty subsequently imposed by the Finance Act, 1894, and the direction was therefore inoperative.

Originating Summons.

By her will, dated August 20, 1888, when probate duty was in force, a testatrix, after appointing the plaintiffs her executors and trustees and bequeathing certain legacies, gave her trustees (inter alia) all the Consols which might be standing in her name at her decease upon trust in the events that happened for her brother Joseph Kennedy for life and subject thereto upon trust to raise thereout "the amount of the probate duty which may be payable on the proving of this my will in respect of the said Government Consolidated Annuities," the said sum when raised to fall into her residuary personal estate. The balance of the Consols was to be held in trust for certain specific legatees, and the residuary personal estate in trust for certain residuary legatees.

The testatrix died on August 19, 1896, after the commencement of the Finance Acts, 1894 and 1896, so that estate duty and not probate duty was payable. Joseph Kennedy died on November 15, 1909, and the Consols became divisible.

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This summons was issued to determine whether the estate duty attributable to the Consols was to be raised out of the Consols and repaid to residue.

St. John Clerke, for the executors and trustees.

Attwater, for the residuary legatees. The term probate duty was a popular expression for the duty that had to be paid before probate was granted. It is not a technical legal term and it does not occur in any statute. (1) Prior to the Customs and Inland Revenue Act, 1881, the duty was paid by a stamp on the probate, but under s. 30 of that Act it was paid by a stamp on the affidavit leading to probate. This duty was repealed by the Finance Act, 1894, and estate duty imposed. Estate duty is of a wider scope than probate duty, but it includes the amount of the duty necessarily payable on obtaining probate, i.e., the duty on the personal property of which the testatrix was competent to dispose at her death, including the Consols. It is a stamp duty collected on the Inland Revenue affidavit as before the Act: see Finance Act, 1894, s. 7. This is the duty that the testatrix intended to be raised out of the Consols. As the testatrix died after the Finance Act, 1896 (59 & 60 Vict. c. 28), s. 19, the settlement estate duty was not payable on probate.

In *In re Hadley* (2) Parker J. says, "Estate duty, though imposed for the first time by the Act of 1894, takes the place of probate duty in respect of all property which was subject to probate duty before the Act was passed." It is, of course, a question of the testatrix's intention, but it is submitted she clearly intended the duty necessarily payable on obtaining probate, so far as attributable to the Consols, to be paid out of those Consols.

In *In re Bridger* (3) a testator made his will before but died after the passing of the Mortmain and Charitable Uses Act, 1891 (54 & 55 Vict. c. 73), s. 9. He bequeathed "such part of my said residuary trust estate which by law may be given for

(1) See, however, Customs and Inland Revenue Act, 1881, Part III., "As to Probate and Legacy Duties"; Local Government Act, 1888 (51 & 52 Vict. c. 41), ss. 21, 22; Finance Act, 1894, s. 19.

(2) [1909] 1 Ch. 20, 22.

(3) [1894] 1 Ch. 297.

charitable purposes " to a charity. It was held that the charity took the residue, both real and personal.

George Cartwright and *Dighton Pollock*, for the specific legatees of the Consols. Estate duty is not a mere substitute for probate duty. In *In re Hadley* (1) Fletcher Moulton L.J. says, " Estate duty therefore differed essentially from probate duty, which was abolished by the same Act, and the place of which, to a certain extent, it was intended to take " ; and Farwell L.J. says, " I can find no foundation for the argument that estate duty was intended to take the place of probate duty, so as to make decisions in probate duty cases applicable to estate duty."

In *In re Pullen* (2) Warrington J. says, " Assuming *Shepheard* v. *Beetham* (3) to be good law, so far as it goes, it seems to me I am not bound to follow it. It has reference to probate duty and not to estate duty." There are many differences between the duties—e.g., (*a*) Estate duty is leviable on realty and personalty, probate duty on personalty only. (*b*) In the case of a person domiciled in the United Kingdom estate duty is leviable on foreign personalty, secus probate duty. (*c*) Estate duty is leviable on property subject to a general power, probate duty only if the power is exercised. (*d*) Estate duty varies with the amount of the estate. Probate duty for estates over 1000*l.* was only 3 per cent. (*e*) All property, real and personal, is aggregated for the purpose of determining the rate of estate duty. (*f*) There are provisions for an official valuation in the case of estate duty (s. 7, sub-s. 8), but none for probate duty.

The will must be construed without reference to the subsequent statute : *Jones* v. *Ogle* (4), a case under the Apportionment Act, 1870 (33 & 34 Vict. c. 35).

In *In re Bridger* (5) the subsequent statute merely extended the testator's power of disposition. It did not affect the construction of his will.

In *In re Rayer* (6) a testator made his will in 1882 and charged certain annuities on his real estate. He directed them to be paid " without any deductions except for legacy duty and income tax."

(1) [1909] 1 Ch. 20, 32, 36.
(2) [1910] 1 Ch. 564, 573.
(3) (1877) 6 Ch. D. 597.
(4) (1872) L. R. 8 Ch. 192.
(5) [1894] 1 Ch. 297.
(6) [1903] 1 Ch. 685, 688.

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Legacy duty on annuities charged on real estate was abolished by the Customs and Inland Revenue Act, 1888 (51 & 52 Vict. c. 8), and succession duty imposed. After the passing of this Act the testator made a codicil confirming his will. On the ground of this confirmation Farwell J. was able to construe the will as if made after the Act and to treat the expression "legacy duty" as a falsa demonstratio. He says: "The succession duty, which had been substituted for legacy duty, was in fact more onerous than and was different in some respects from the legacy duty . . . . so that the duties are by no means identical. This variation would have caused me considerable difficulty if there had been no codicil confirming the will; but the joint effect of will and codicil is that I have a document directing payment of a rent-charge 'without any deduction except legacy duty,' made at a time when there was no duty called by that name, but another duty recently substituted for it called succession duty."

The question is what did the testatrix mean by "probate duty"? Did she mean any duty for the time being imposed by any subsequent Act, or did she mean probate duty? The words "which may be payable on the proving of this my will in respect of" the Consols merely limit the amount to the amount of probate duty attributable to the Consols. The residuary legatees' argument strikes out the word "probate" altogether.

This is really a case of ademption. The testatrix has bequeathed a definite amount of probate duty to the residuary legatees. That duty existed at the date of her will but not at her death. The bequest is therefore inoperative.

SWINFEN EADY J. (after stating the facts). The question is whether estate duty is to be raised out of the Consols which have now become divisible. The will directs the trustees to raise "the probate duty which may be payable on the proving of this my will in respect of" those Consols. In 1888, when the will was made, there was a duty well known as probate duty to which the direction could apply, though the residuary legatees may be correct in saying that the actual expression does not occur in any statute. It was, however, a duty that had to be paid before probate was issued.

Sect. 30 of the Customs and Inland Revenue Act, 1881 (44 & 45 Vict. c. 12), provides that "No probate or letters of administration shall be granted by the Probate, Divorce, and Admiralty Division . . . . in England . . . . unless the same bear a certificate in writing under the hand of the proper officer of the Court, showing that the affidavit for the Commissioners of Inland Revenue has been delivered, and that such affidavit, if liable to stamp duty, was duly stamped, and stating the amount of the gross value of the estate and effects as shown by the account." On that affidavit being duly stamped probate issued.

The testatrix directs her trustees to raise "the amount of the probate duty which may be payable on the proving of this my will in respect of" the Consols. If the law had remained unaltered there would have been no difficulty in ascertaining this amount. But between her will and her death the Finance Act, 1894, was passed. It provides (s. 1) that "in the case of every person dying after the commencement of this part of this Act, there shall . . . . be levied and paid, upon the principal value, ... of all property, real or personal, settled or not settled, which passes on the death of such person a duty called 'estate duty' at the graduated rates hereinafter mentioned, and the existing duties mentioned in the First Schedule to this Act shall not be levied in respect of property chargeable with such estate duty." The First Schedule includes the stamp duties imposed by the Customs and Inland Revenue Act, 1881, on the affidavit required for probate.

The residuary legatees contend that, though probate duty was no longer payable at the testatrix's death, estate duty had taken its place, and the testatrix really intended this duty to be raised out of the Consols. This contention is not well founded. The direction in the will was perfectly clear. It was to raise the amount of the probate duty payable in respect of the Consols. Though in some respects estate duty has replaced probate duty, it is not a mere substitute for it. It is a duty of far wider scope with rates varying according to the amount of the property, real and personal. I am quite unable to read the will as directing the trustees to raise "the amount of any duty whatever that may for the time being be payable on the proving of this my will in

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respect of" the Consols. The will does not operate as a direction to raise this larger duty subsequently imposed by the Finance Act, 1894, and the direction therefore does not take effect.

Solicitors: *Anderson & Sons; Roy & Cartwright; Peacock & Goddard.*

G. R. A.

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1910
May 5.

In re RICHARDS. DAVIES *v.* EDWARDS.

[1910 R. 307.]

Will—Bequest of Residue—"Equally between" Statutory Next of Kin—Per stirpes or per capita.

A testator directed his trustees to stand possessed of one moiety of his residuary estate "for and equally between" the persons "who at my death shall be my next of kin according to the statutes for the distribution of the estates of intestates":—

Held, that as there was no reference to the statutory mode of distribution as in *Holloway* v. *Radcliffe*, (1857) 23 Beav. 163, and *Fielden* v. *Ashworth*, (1875) L. R. 20 Eq. 410, but the statutes were only referred to for the purpose of defining the class, the word "equally" must have its full effect, and the statutory next of kin would take per capita.

Observations in *Mattison* v. *Tanfield*, (1840) 3 Beav. 131, and *Fielden* v. *Ashworth*, L. R. 20 Eq. 410, followed.

ORIGINATING SUMMONS.

By his will, dated July 11, 1906, a testator devised and bequeathed his real and personal estate to his executors and trustees upon trust for sale and conversion. After giving certain pecuniary legacies the will proceeded: "I direct my trustees to stand possessed of one moiety or equal half part of the residue of my estate for and equally between the person or persons (including any of my next of kin to whom I have already given legacies by this my will) who at my death shall be my next of kin according to the statutes for the distribution of the estates of intestates."

The testator died on October 17, 1908.

This summons was issued to determine (inter alia) whether the above moiety was to be distributed per stirpes or per capita.

The case was argued on the tacit assumption that the phrase "according to the statutes for the distribution of the estates of intestates" was merely an adjective qualifying "next of kin."

Arnold Herbert, for the executors and trustees.

Austen-Cartmell, for the legal personal representative of a sister who survived the testator. The word "equally" does not prevent the statute fixing the proportions as well as the persons: *Holloway* v. *Radcliffe* (1); *Fielden* v. *Ashworth*. (2) The word "equally" is actually used in the statute itself with reference to an equal stirpital distribution: Statute of Distribution (22 & 23 Car. 2, c. 10), s. 6; Chitty's Statutes, 5th ed., Executors, p. 9 (there numbered s. 3). That is what the testator intended.

H. S. Preston, for the children of a sister who predeceased the testator. In *Holloway* v. *Radcliffe* (1) and *Fielden* v. *Ashworth* (2) there were words pointing to the statutory mode of distribution. In *Phillips* v. *Garth* (3) a testator gave his residue to his executors to be equally divided by them to and amongst his next of kin, share and share alike. Buller J. held that the property went to the statutory next of kin and that they took per capita. On a rehearing Lord Thurlow was inclined to think that the nearest of kin, namely, the brothers, were entitled to the exclusion of nephews and nieces, but the case was compromised without a decision. Buller J.'s decision that statutory next of kin were intended was disapproved by Lord Eldon L.C. in *Garrick* v. *Lord Camden* (4) and overruled by the Lords Commissioners Shadwell and Bosanquet in *Elmsley* v. *Young* (5), but his decision that the parties entitled took per capita was not touched.

In *Mattison* v. *Tanfield* (6) Lord Langdale M.R. says that the words "equally" or "share and share alike" import an intention that the statutory next of kin are to take per capita. See also Jarman on Wills, 5th ed. p. 954; Theobald on Wills, 7th ed. p. 337.

Austen-Cartmell in reply. Lord Langdale's observation in *Mattison* v. *Tanfield* (6) was only a dictum. The decision was

(1) 23 Beav. 163.
(2) L. R. 20 Eq. 410.
(3) (1790) 3 Bro. C. C. 64.
(4) (1807) 14 Ves. 372, 385.
(5) (1835) 2 My. & K. 780, 789, 798.
(6) 3 Beav. 131.

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the other way. *Phillips* v. *Garth* (1) cannot be considered an authority, as the judgment was not carried into effect. There is no other case in which such a distribution has been directed: see observations in *Elmsley* v. *Young*. (2)

SWINFEN EADY J. The testator directed his trustees to stand possessed of one moiety of his residuary estate "for and equally between" the person or persons "who at my death shall be my next of kin according to the statutes for the distribution of the estates of intestates."

It is well settled that under a gift to next of kin without reference to the statute the property passes to the nearest kindred in blood, and not the statutory next of kin. But if the will contains a reference to the statute the property passes to the statutory next of kin.

The next question is in what shares the statutory next of kin are to take. The testator may in terms have directed that the statute is to regulate the shares in which they are to take, e.g., by the words "in such and the like manner" as under the statute, or the will may be silent on the subject. In either case, the statutory next of kin will take in the shares fixed by the statute, i.e., per stirpes. If, however, the testator does not in terms refer to the statutory mode of distribution, but on the contrary directs that the statutory next of kin are to take equally, effect must be given to that direction and there must be an equal division.

In the present case the property is to go "equally between" the statutory next of kin, and when once the class is determined, a direction that the members are to take equally imports an equal division per capita.

In *Mattison* v. *Tanfield* (3), where the gift was to the statutory next of kin as tenants in common, Lord Langdale M.R. said: "The question is, therefore, reduced to this, whether the words of the will import an intention that the next of kin, though some of them derive their character as such by representation, are nevertheless to take per capita. The cases seem

(1) 3 Bro. C. C. 64.
(2) 2 My. & K. 794, 795.
(3) 3 Beav. 131, 132.

to shew that the word 'equally,' or the words 'share and share alike,' would here have had that effect. But the gift in this case is to the persons, and their heirs as tenants in common, and these words are not exclusively applicable to equal interests as the words 'equally,' and 'share and share alike'; and there being nothing in the will to shew a contrary intention, I think, that the parties who made out their right to be legatees, or devisees as next of kin by representation according to the statute, must under the will take by virtue of that representation, and only take the share of the person they represent. I think, therefore, that the estate belongs to the next of kin in shares to be determined by a distribution per stirpes."

In that case there were no words importing an equal division.

In *Holloway* v. *Radcliffe* (1) the gift was "unto and equally amongst my legal personal representatives, in such and the like manner as if the same had been to be paid under the Statute of Distribution," so there was an express reference to the statutory mode of distribution.

Similarly in *Fielden* v. *Ashworth* (2) the gift was "to my relatives, share and share alike, as the law directs"—words importing the statutory mode of distribution. Malins V.-C. says: "If it had been merely a gift to the relatives, share and share alike, then the relatives would have included only those under the statute—a class easily ascertained—and it would have made them take per capita and not per stirpes; but he adds, 'as the law directs.'" He held that those words imported the statutory mode of distribution.

The rule is correctly stated in Jarman on Wills, 5th ed. p. 954: "If a testator describes the objects of gift by express reference to the statute, as next of kin under or according to the statute, and does not expressly state how they are to take, they take according to the mode and in the shares directed by the statute, sc. per stirpes and as tenants in common. This mode of distribution would be excluded by an express direction to divide in equal shares, but not by a mere direction to take as tenants in common, without specifying the shares."

Mr. Austen-Cartmell pointed out that the word "equally" was

(1) 23 Beav. 163. (2) L. R. 20 Eq. 410, 412.

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used in s. 6 of the Statute of Distribution and contended that the words of the will pointed to an equal stirpital distribution. But the statute provides that "In case there be no children nor any legal representatives of them, then one moiety of the said estate to be allotted to the wife of the intestate, the residue of the said estate to be distributed equally to every of the next of kindred of the intestate who are in equal degree and those who legally represent them." The context shews what "equally" means in that section, namely, an equal stirpital distribution.

There is no such context in the present will. The distribution will therefore be per capita.

Solicitors: *Smith & Hillis, for Minshall, Parry-Jones & Pugh, Oswestry; Le Brasseur & Oakley, for W. Kenrick Minshall, Oswestry; Bentley & Jones, for E. Foulkes Jones, Llangollen.*

G. R. A.

SWINFEN EADY J.
1910
May 10, 25.

In re RUSSELL HUNTING RECORD COMPANY, LIMITED.

[00385 of 1908.]

Company — Winding-up — Fraudulent Preference — Voluntary followed by Compulsory Winding-up—Date of Act of Bankruptcy—Companies Act, 1862 (25 & 26 *Vict.* c. 89), *s.* 164—*Companies (Consolidation) Act*, 1908 (8 *Edw.* 7, *c.* 69), *s.* 210.

When a voluntary winding-up is followed by a compulsory winding-up, then, for the purpose of the fraudulent preference section (Companies Act, 1862, s. 164; Companies (Consolidation) Act, 1908, s. 210), the act of bankruptcy is the presentation of the petition.

In re Taurine Co., (1883) 25 Ch. D. 118, 138, applied.

MISFEASANCE SUMMONS.

This was a summons by the liquidator of the above company for a declaration that the secretary and certain directors were guilty of misfeasance in making certain payments alleged to be undue or fraudulent preferences within s. 164 of the Companies Act, 1862, and that the directors were liable to make good any loss thereby occasioned.

The payments extended from March 13, 1908, to May 1, 1908, both inclusive.

On May 4, 1908, an extraordinary resolution for the voluntary winding-up of the company was passed.

On December 12, 1908, a petition for a compulsory order was presented, and on January 26, 1909, a compulsory order was made.

On July 30, 1909, the liquidator issued this summons in the compulsory winding-up proceedings.

The respondents filed a considerable body of evidence on the merits, but at the hearing they took the preliminary objection that the alleged fraudulent preferences were all more than three months before the winding-up petition and therefore not impeachable under s. 164.

Hon. Frank Russell, K.C., and *H. E. Wright*, for the liquidator, opened the summons.

Gore-Browne, K.C., and *George Hart*, for one of the directors. The moneys paid were all really due to the various creditors, but the payments are impeached as undue or fraudulent preferences within s. 164 of the Companies Act, 1862, which provides that any payment that would be a fraudulent preference in bankruptcy shall be a fraudulent preference in a winding-up "and shall be invalid accordingly."

The act corresponding to the act of bankruptcy is fixed as follows: "For the purposes of this section the presentation of a petition for winding up a company shall in the case of a company being wound up by the Court or subject to the supervision of the Court and a resolution for winding up the company shall, in the case of a voluntary winding-up, be deemed to correspond with the act of bankruptcy in the case of an individual trader." This is a compulsory winding-up, and therefore the act of bankruptcy was the presentation of the petition.

This section is now replaced by s. 210 of the Companies (Consolidation) Act, 1908, but the present winding-up was under the Act of 1862. Sect. 48 of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), avoids fraudulent preferences made within three months of the act of bankruptcy. In the present case the material date is December 12, 1908, when the petition for the compulsory order was presented. The transactions impeached were all more than three months before that date.

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The voluntary winding-up was completely superseded by the compulsory order: *In re Taurine Co.* (1) In that case a voluntary winding-up was followed by a compulsory order and it was held that for the purpose of settling the B list of contributories under s. 38 of the Companies Act, 1862, now s. 123 of the Companies (Consolidation) Act, 1908, the date of the presentation of the petition and not the date of the voluntary winding-up must be taken as the commencement of the winding-up.

This is not a decision on s. 164, but it shews that a compulsory winding-up supersedes a voluntary winding-up even to the extent of discharging persons who would have been liable under the voluntary winding-up.

Lavington, Tindale Davis and *L. B. Dunn*, and *Arthur Sims*, for the other respondents except the secretary and one director who were not represented.

Hon. Frank Russell, K.C., and *H. E. Wright*, for the liquidator. *In re Taurine Co.* (1) is distinguishable. The B list was being settled in the compulsory winding-up. Sect. 38 provides that no past member shall be liable to contribute if he has ceased to be a member for a year "prior to the commencement of the winding-up." It was in effect held that those words referred to the winding-up in which the B list was settled. If the B list had been settled in the voluntary winding-up the Court could have adopted it under s. 146 of the Companies Act, 1862, now s. 198 of the Companies (Consolidation) Act, 1908. But in the circumstances they could only settle it under the compulsory winding-up.

In the present case we are not asking the Court to settle anything depending on "the commencement of the winding-up." That date is not mentioned in s. 164. There are three alternative dates: (*a*) In the case of a compulsory winding-up, the presentation of the petition. This happens to be the same as "the commencement of the winding-up." (*b*) In the case of a supervision order, the presentation of the petition. This is not "the commencement of the winding-up," which dates from the winding-up resolution. (*c*) In the case of a voluntary winding-up, the resolution. This again happens to be "the commencement of the winding-up."

(1) 25 Ch. D. 118, 138.

Now these payments were all made within three months of the extraordinary resolution and were therefore "invalid accordingly" under s. 164. There is nothing whatever in the section to rehabilitate them. The voluntary winding-up is no doubt stayed or superseded, but it is not nullified ab initio, so as to be treated as if it never existed. The payments therefore remain invalid and can still be impeached. The respondents' construction would render a compulsory order most prejudicial to creditors.

Gore-Browne, K.C., in reply. The applicant is really attempting to read the words "whichever shall first happen" into s. 164. The section will not bear that construction. In the case of a voluntary winding-up followed by a supervision order the act of bankruptcy is clearly postponed to the date of the petition, and it would be strange if a compulsory order were treated differently.

SWINFEN EADY J. The preliminary objection taken to this summons is that the transactions impeached, though all within three months of the voluntary winding-up, were none of them within three months of the presentation of the petition for the compulsory order which the respondents contend is the material date.

The question turns on the construction of s. 164 of the Companies Act, 1862, which provides that "any such conveyance, mortgage, delivery of goods, payment, execution, or other act relating to property as would, if made or done by or against any individual trader, be deemed in the event of his bankruptcy to have been made or done by way of undue or fraudulent preference of the creditors of such trader, shall, if made or done by or against any company, be deemed, in the event of such company being wound up under this Act, to have been made or done by way of undue or fraudulent preference of the creditors of such company, and shall be invalid accordingly; and for the purposes of this section the presentation of a petition for winding up a company shall in the case of a company being wound up by the Court or subject to the supervision of the Court, and a resolution for winding up the company shall, in the case of a

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voluntary winding-up, be deemed to correspond with the act of bankruptcy in the case of an individual trader . . . ."

The effect of the last part of the section is that, in the case of a company being wound up by the Court, the act corresponding with the act of bankruptcy is the presentation of the petition. I do not see any way of escape from the provisions of the section. The language is precise. The company is being wound up by the Court under the Act. The transactions complained of are undue or fraudulent preferences within three months of the act of bankruptcy, the period fixed by s. 48 of the Bankruptcy Act, 1883, and for the purposes of the section the presentation of the petition " shall, in the case of a company being wound up by the Court . . . . be deemed to correspond with the act of bankruptcy . . . ." The three months therefore date from December 12, 1908, and the transactions complained of were considerably more than three months before that date.

If that were all, I should be bound to put that construction on the section. But some light is thrown on the point by *In re Taurine Co.* (1) In that case a voluntary winding-up was followed by a compulsory order and it was held that past members who had been members within a year of the voluntary winding-up but not within a year of the compulsory winding-up were not liable to be placed on the B list of contributories under s. 38 of the Companies Act, 1862. Lindley L.J. pointed out that the effect of the Act was that the voluntary winding-up was superseded by the compulsory winding-up although there there was no express provision to this effect. He says : " There is not in the Act any express provision as to the commencement of a compulsory winding-up preceded by a voluntary winding-up. Sect. 152 does not in terms hit that case, being addressed only to the case of a supervision order followed by a compulsory order. The reason for that omission seems to me to be this—no enactment that the order for compulsory winding up should supersede a voluntary winding-up was needed ; because when you come to work out practically the provisions of the Act which relate to compulsory winding up, you find that they cannot be worked concurrently with the sections which

(1) 25 Ch. D. 118, 138, 139.

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relate to the voluntary winding-up; and supersession or stay of the proceedings in the voluntary winding-up is the inevitable consequence of the winding-up order." In other words, though the effect was to let off certain past members from liability, the compulsory winding-up inevitably superseded the voluntary winding-up. He added that "the Court could not, in making the order for the compulsory winding-up, throw the commencement of the winding-up back, and make it date from the resolution for the voluntary winding-up." Fry L.J. concurred. In the present case there are no "proceedings taken in the course of the voluntary winding-up" that I can adopt under s. 146 of the Companies Act, 1862. The preliminary objection is therefore valid, and the summons must be dismissed.

Solicitors: *Burn & Berridge; Goldberg, Barrett & Newall; Strong, Buckmaster & Bolden; James Dowling; Bellord, Coveney, Synnott & Figgis.*

G. R. A.

WARRINGTON J.
1910
April 20, 21.

In re EARL OF STAMFORD AND WARRINGTON. PAYNE *v.* GREY.

[1909 S. 3691.]

Revenue—Estate Duty—Incidence—Settlement of several Estates to different Uses—Estates subject to Mortgages of different Amounts—Creation of Term in one Estate for Purpose of discharging Mortgages on all—Payment off of Mortgages by Trustees of Term—Recoupment of Estate Duty by Persons entitled to Estates benefited—"Person entitled to any sum charged"—Finance Act, 1894 (57 & 58 *Vict. c.* 30), *s.* 14, *sub-s.* 1.

By the Finance Act, 1894, s. 14, sub-s. 1, "In the case of property which does not pass to the executor as such, an amount equal to the proper rateable part of the estate duty may be recovered by the person, who being authorised or required to pay the estate duty in respect of any property has paid such duty, from the person entitled to any sum charged on such property, (whether as capital or as an annuity or otherwise,) under a disposition not containing any express provision to the contrary":—

Held, that a person entitled to the benefit of a trust for the application of the rents and profits of an estate in the discharge of the incumbrances on his own estate was not a person "entitled to any sum charged" on

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such estate "whether as capital or as an annuity or otherwise" within the meaning of the sub-section.

A testator settled his A., B., and C. estates to different uses in strict settlement, and limited his D. estate to trustees for a term of 1000 years, and subject to the term he settled the estate as to one moiety to the uses declared of the A. estate, and as to the other moiety to the uses declared of the B. estate. And he declared that the term of 1000 years was limited to the trustees upon trust to apply the rents and profits of the D. estate in the discharge of the mortgage debts and other gross sums charged upon the four estates or any of them:—

Held, that the estate duty payable in respect of the D. estate was a first charge on that estate and was raisable by mortgage or sale thereof, and that the interest on any mortgage so raised was payable out of the rents and profits of that estate with no right of recoupment of either capital or income as against any other of the estates.

ADJOURNED SUMMONS.

The testator, the seventh Earl of Stamford and Warrington, who died on January 2, 1883, was entitled at his death to four separate estates (hereinafter referred to as the Staffordshire estate, the Leicestershire estate, the Cheshire estate, and the Lancashire estate respectively).

By his will, dated June 26, 1875, he settled the Staffordshire, Leicestershire, and Cheshire estates to different uses in strict settlement.

He settled the Lancashire estate to the use of trustees for a term of 1000 years, and, subject to that term, as to one moiety to the uses declared of the Staffordshire estate, and as to the other moiety to the uses declared of the Leicestershire estate.

Each of the four estates was at the death of the testator subject to certain incumbrances of varying amounts, the amount of the incumbrances on one estate being larger than the amount of the incumbrances on another.

The trusts of the term of 1000 years of the Lancashire estate were, shortly, that the trustees should apply the rents and profits in aid of the testator's personal estate first in payment of his funeral and testamentary expenses, debts, legacies and annuities given by the will, and next in discharge and satisfaction of the mortgage debts and other gross sums charged on the four estates which at the date of his death should remain unpaid; and the testator directed that the rents should be applied in discharge of the incumbrances on the several estates in the following order—

first, those on the Staffordshire estate, then those on the Leicestershire, Cheshire, and Lancashire estates in that order. The testator directed that the person or persons for the time being entitled to the possession or receipt of the rents and profits of the four estates respectively should keep down the interest payable in respect of the mortgage debts and other gross sums charged on those estates until the same should have been fully discharged and satisfied.

The testator gave a life interest to his wife in all the estates. She died on January 25, 1905, and thereupon estate duty became payable in respect of the four estates.

This was an originating summons taken out by the present trustees of the will for the determination (inter alia) of the question how as between the several estates the estate duty which became payable in respect of the Lancashire estate and the mortgages created or to be created on the Lancashire estate for the purpose of discharging such duty and the interest thereon respectively ought to be borne and paid.

T. H. Carson, K.C., and *A. L. Ellis*, for the summons.

Cave, K.C., and *W. R. Sheldon*, for the persons beneficially entitled to the Staffordshire estate and ultimately to a moiety of the Lancashire estate. The question is whether the Lancashire estate, having paid the estate duty on the sums applied or to be applied in the reduction of the mortgages on the other estates, is entitled to be recouped by those estates the amount of the duty so paid. The material sections of the Finance Act, 1894, upon which the question turns are s. 8, sub-s. 4, s. 9, sub-s. 5, and s. 14, sub-s. 1. (1)

(1) The Finance Act, 1894, provides:—

Sect. 8, sub-s. 4: "Where property passes on the death of the deceased, and his executor is not accountable for the estate duty in respect of such property, every person to whom any property so passes for any beneficial interest in possession, and also, to the extent of the property actually received or disposed of by him, every trustee, guardian, committee, or other person in whom any interest in the property so passing or the management thereof is at any time vested, and every person in whom the same is vested in possession by alienation or other derivative title shall be accountable for the estate duty on the property . . . ."

Sect. 9, sub-s. 5: "A person

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The term constitutes a charge upon the rents and profits of the Lancashire estate for the payment off of the incumbrances on the other estates, and the persons entitled to the benefit of that charge ought to pay their rateable part of the estate duty: s. 14, sub-s. 1. There is no authority which is of much assistance upon the point, but the principle of s. 14, as appears from *Berry* v. *Gaukroger* (1), is that the estate duty must be paid ultimately by the persons beneficially entitled to the property in proportion to their respective interests in it. In the present case the trustees of the term in the Lancashire estate, having been directed to pay the estate duty on that estate, are persons under s. 14, sub-s. 1, who are authorized or requested to pay the estate duty in respect of that property, which did not pass to them as executors, and consequently they may recover back from the persons entitled to the benefit of the sums charged on the property a rateable proportion of the duty.

Further, so long as any one of the four estates is entitled to have any part of the rents and profits of the Lancashire estate applied for its benefit it ought to keep down the interest on the proportionate amount of the estate duty attributable to it: *In re Parker-Jervis* (2); *In re Maryon-Wilson* (3); *In re Duke of St. Albans.* (4)

H. Terrell, K.C., and *Owen Thompson*, for the persons beneficially entitled to the Leicestershire estate and ultimately

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authorised or required to pay the estate duty in respect of any property shall, for the purpose of paying the duty, or raising the amount of the duty when already paid, have power, whether the property is or is not vested in him, to raise the amount of such duty and any interest and expenses properly paid or incurred by him in respect thereof, by the sale or mortgage of or a terminable charge on that property or any part thereof."

Sect. 14, sub-s. 1: "In the case of property which does not pass to the executor as such, an amount equal to the proper rateable part of the estate duty may be recovered by the person, who being authorised or required to pay the estate duty in respect of any property has paid such duty, from the person entitled to any sum charged on such property, (whether as capital or as an annuity or otherwise,) under a disposition not containing any express provision to the contrary."

(1) [1903] 2 Ch. 116.
(2) [1898] 2 Ch. 643.
(3) [1900] 1 Ch. 565.
(4) [1900] 2 Ch. 873.

to the other moiety of the Lancashire estate, supported the same argument. The scheme of the Finance Act, 1894, is that estate duty is a charge which is to be borne by the persons entitled to the property according to their beneficial interests in it. The persons entitled to the Lancashire estate, therefore, ought only to be called upon to pay estate duty on the value of that estate after deducting therefrom the amounts of the rents and profits of that estate applied or to be applied in the payment off of the mortgages on the other estates. Under the Act the trustees of the term are required to pay the duty on the Lancashire estate. That requirement, however, is only for the purpose of facilitating the collection of the duty; it does not affect the question as to how the burden of it is ultimately to be borne. That matter is dealt with by s. 14, sub-s. 1, which provides that it shall be borne by "the person entitled to any sum charged on such property (whether as capital or as an annuity or otherwise)." It is true that the sums here charged are not charged on the Lancashire estate "as capital or as an annuity," but it is submitted that the charge falls within the words "or otherwise" in the sub-section. The effect of the Act is to make the estate to be benefited the estate by which the "proper rateable part" of the duty is ultimately to be borne. The Lancashire estate is the less valuable by reason of the disposition of the testator in favour of the other estates, and those other estates are the more valuable by reason of the testator having directed that the mortgages upon them should be discharged by the Lancashire estate.

H. T. Method, for other persons entitled to the Leicestershire estate, supported the same contention and referred to s. 7 of the Act.

T. J. C. Tomlin, for the persons entitled to the Cheshire estate. The duty is payable out of the Lancashire estate.

[He was stopped on this point.]

Then as to the interest on the amount of the estate duty, it is submitted that, estate duty being a charge upon the corpus of the Lancashire estate, the burden of paying the interest on the amount raised for the payment of that duty must be borne by the persons entitled in succession to that estate, either in the form of a reduction of the rents and profits by reason of a sale

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of part of the estate for payment of the duty, or of a deduction therefrom of the amount of the interest on the mortgage if the estate is mortgaged for that purpose.

WARRINGTON J. The question in this case is how, as between the several estates, the duty payable in respect of the Lancashire estate on the death of the testator's widow, and the mortgages to be created for the purpose of discharging that duty, and the interest on such mortgages, ought to be borne and paid. [His Lordship stated the facts substantially as above set forth, and continued:—] The contention put forward by the persons respectively entitled to the Staffordshire and Leicestershire estates, that is to say, by those who are ultimately entitled to the Lancashire estate under the limitation subject to the term of 1000 years, is that a proportionate part of the duty on the Lancashire estate ought to be borne by each of the four estates whose incumbrances are directed to be paid out of the rents and profits of the Lancashire estate in proportion to the amount of those incumbrances, or that, at all events, the person or persons entitled to the rents and profits of each of those estates ought to keep down a proportionate part of the interest on the mortgage created for the purpose of raising the duty during the period (an indeterminate period) while the trustees are discharging the incumbrances on each particular estate. Are those contentions well founded, or is not this the correct view—that the estate duty on the Lancashire estate is a first charge on that estate by virtue of the Finance Act, 1894, and that the trustees ought to raise the amount of that duty by a mortgage, which of course would be paramount to all the trusts of the will, and to keep down the interest on that mortgage, that is to say, the interest on the amount of the duty, as a first payment out of the rents and profits of the estate before they can apply them under the trusts of the term of 1000 years? Those are the two contentions.

The material sections of the Finance Act, 1894, are sub-s. 4 of s. 8, and sub-s. 1 of s. 14. I do not think there are any other provisions of the Act which are really material to the case which I have to consider. Sub-s. 4 of s. 8 is in these terms: "Where property passes on the death of the deceased"—as of course the

Lancashire estate passed—"and his executor is not accountable for the estate duty in respect of such property"—as of course the executors of Lord Stamford and Warrington were not accountable—"every person to whom any property so passes for any beneficial interest in possession, and also, to the extent of the property actually received or disposed of by him, every trustee, guardian, committee, or other person in whom any interest in the property so passing or the management thereof is at any time vested, and every person in whom the same is vested in possession by alienation or other derivative title shall be accountable for the estate duty on the property." I do not think there is anything else I need read. There is the provision in s. 9 enabling the person who is to pay the estate duty to raise the amount by mortgage, but that really is not material on the question which I have to determine. I come to s. 14, sub-s. 1: "In the case of property which does not pass to the executor as such,"—that of course is this case—"an amount equal to the proper rateable part of the estate duty may be recovered by the person, who being authorised or required to pay the estate duty in respect of any property has paid such duty, from the person entitled to any sum charged on such property, (whether as capital or as an annuity or otherwise,) under a disposition not containing any express provision to the contrary."

The contention on the part of the persons entitled to the Staffordshire and Leicestershire estates is that the persons entitled to the four estates are respectively persons entitled to sums charged on the property (the Lancashire estate), and that as such they are by the provisions of s. 14 accountable for a proportionate part of the duty. Is that the true view of the limitations contained in this will? In the first place, none of those persons are accountable for the duty, nor are the persons ultimately entitled subject to the term of 1000 years at the present moment accountable for the duty. The property has not yet passed to any person for any beneficial interest in possession. The property under the will passed on the testator's death to the trustees for the term of 1000 years, and will pass after the determination of that term to the persons interested in the Staffordshire and Leicestershire estates. It is therefore a case of a

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limitation of the estate to several persons in succession, not the less so because the persons first taking the estate are trustees who have to apply the rents and profits in a particular manner. To put it in another way—dealing now with the beneficial interest—the several persons interested in the several estates have beneficial interests in succession in the rents and profits of the Lancashire estate, those beneficial interests consisting in the right to have the charges on their respective estates, in the order as specified by the testator, discharged out of the Lancashire rents and profits, thereby relieving them of the burden of the interest otherwise payable in respect of those several incumbrances. It seems to me that is the true view of the limitations of this will, and that I have not here a case in which there are any sums charged on the property by way of capital, annuity, or otherwise. I have before me simply beneficial limitations in succession, first in the rents and profits under the term of 1000 years, and then in the corpus of the estate on the expiration or sooner determination of that term. I think, therefore, that the proper answer to the question that is put to me is that the estate duty on the Lancashire estate is a charge upon the corpus of that estate, and must be paid out of, or raised by mortgage of, the corpus of that estate, and it is of course a charge on that estate paramount to the several limitations of the will. In my opinion there is no right on the part of those who ultimately are entitled to the Lancashire estate to call for the recoupment by the persons entitled to the four estates of any proportionate part of the duty.

With regard to the interest, the contention on the part of the persons ultimately entitled is that, during the indeterminate period during which there are subsisting incumbrances on each of the estates which the trustees are to discharge out of the rents and profits, the persons entitled to each estate ought to bear the interest on the money raised for payment of the duty. That contention is answered by what I have already said. In my opinion these several persons cannot be treated as being entitled to annuities charged on the Lancashire estate. I think that the right view is that they are entitled to certain beneficial interests in succession, and the owners of each of the estates will bear

their proper part of the burden of the estate duty by having the period to that extent postponed at which their incumbrances will be discharged—the period during which they have to keep down interest on those incumbrances prolonged. It is quite true that the ultimate interests of the persons ultimately entitled will be postponed also, but it seems to me, in the view that I take of the proper construction of this Act, each of the persons entitled in this rather complicated way to the Lancashire estate will bear his or her fair proportion of the estate duty. The estate duty, as I have said, is a charge on the corpus of the estate and will have to be raised by mortgage, and the interest on that mortgage must be kept down out of the rents and profits before the application of those rents and profits under the terms of the testator's will.

Solicitors: *Bower, Cotton & Bower; Maples, Teesdale & Co., for Lord & Parker, Worcester; Smith, Fawdon & Low, for Wright, Son & Aysom, Leicester; Foyer & Co.; Trower, Still, Freeling & Parkin.*

W. I. C.

WARRINGTON J.

1910

April 28.

JAMES *v.* JACKSON.

[1908 J. 1858.]

Practice—Costs—Claim and Counter-claim—Claim dismissed with Costs—Counter-claim dismissed with Costs—Form of Judgment.

Where the plaintiff's claim and the defendant's counter-claim are both dismissed with costs, the proper form of judgment is to refer it to the taxing Master to tax the defendant's costs of the action and the plaintiff's costs of the counter-claim and to set off the costs of the plaintiff and defendant and to order payment of the balance by the party from whom the same shall be found to be due to the other party.

The action was brought by the plaintiffs for a declaration that a certain lease granted by their predecessors in title to the defendants' predecessors in title had either never come into existence or had long since ceased and determined, and for alternative relief. The defendants counterclaimed for damages for breach of the covenant for quiet enjoyment contained in the lease.

On the action coming on for trial before Warrington J. on February 24, 1910, counsel for the plaintiffs submitted to have the action dismissed against them with costs, and counsel for the defendants, admitting that they were not in a position to prove substantial damage to the defendants, elected not to proceed with the counter-claim. The action and counter-claim were accordingly dismissed with costs, and his Lordship directed that there should be a set-off of the costs.

The minutes of the judgment given out by the registrar (so far as material) were as follows:—

"This Court doth order and adjudge that this action and counter-claim do stand dismissed out of this Court. And it is ordered that it be referred to the taxing Master to tax the costs of the defendants of this action except so far as they have been increased by the defendants' counter-claim, and also to tax the plaintiffs' costs so far only as they have been increased by the defendants' counter-claim. And the taxing Master is to set off the said costs of the plaintiffs and defendants when so taxed, and certify to which of them the balance after such set-off is due.

And it is ordered that such balance be paid by the party from whom the same shall be certified to be due to the other party."

The plaintiffs objected to the minutes of judgment on the ground that they did not carry out the judgment as pronounced by the Court. The case was therefore restored to the paper for settlement of the form of the judgment.

Upjohn, K.C., and *F. H. Schwann*, for the plaintiffs. The judgment ought to be drawn up as it was pronounced.

[They were stopped.]

Cave, K.C., and *W. Llewellyn Williams*, for the defendants. The minutes are drawn up in accordance with the usual practice of the registrars and are based upon Form 4 in Seton on Judgments, 6th ed. p. 246, which is taken from the order made in *Saner* v. *Bilton*. (1) That case was approved of by the Court of Appeal in *Mason* v. *Brentini* (2) and *Atlas Metal Co.* v. *Miller*. (3) [They also referred to *Shrapnel* v. *Laing* (4) and *In re Brown*. (5)]

WARRINGTON J. This is a case in which I have to decide a point of some importance in order to settle the practice in regard to the drawing up of a judgment. It is a simple case. The plaintiffs brought an action against the defendants. The defendants counterclaimed. The result of the action was that the plaintiffs' action was dismissed with costs and the defendants' counter-claim was also dismissed with costs, with a set-off. The question now is how the judgment ought to be drawn up. I think the answer is that it ought to be drawn up exactly as it was pronounced, that is to say that the defendants' costs of the action should be taxed and the plaintiffs ordered to pay them, and that the plaintiffs' costs of the counter-claim should be taxed and the defendants ordered to pay them. The minutes handed out by the registrar propose—in accordance with what is said to be the usual practice—to tax the costs of the defendants except so far as they have been increased by the counter-claim, and to tax the costs of the plaintiffs only so far as they have been increased

(1) (1879) 11 Ch. D. 416.
(2) (1880) 15 Ch. D. 287.
(3) [1898] 2 Q. B. 500.
(4) (1888) 20 Q. B. D. 334.
(5) (1883) 23 Ch. D. 377.

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by the counter-claim, with a set-off of the one against the other. It may be that when the taxing Master comes to tax the costs he will pursue some such course as that which is indicated by the minutes. It might be right that he should do so, but as to that I say nothing. I think the order ought to direct the defendants' costs of the action to be taxed and to order the plaintiffs to pay them, and to direct the plaintiffs' costs of the counter-claim to be taxed and to order the defendants to pay them, with a set-off.

The judgment as passed and entered (so far as material) was as follows:

This Court doth order and adjudge that this action do stand dismissed out of this Court with costs to be paid by the plaintiffs to the defendants, and that the counter-claim do stand dismissed out of this Court with costs to be paid by the defendants to the plaintiffs And it is ordered that it be referred to the taxing Master to tax the costs of the defendants of this action and also to tax the costs of the plaintiffs of the counter-claim And the taxing Master is to set off the said costs of the plaintiffs and defendants and to certify to which of them the balance after such set-off is due And it is ordered that such balance be paid by the party from whom the same shall be certified to be due to the other party.

Solicitors: *Beamish, Hanson, Airy & Feiling, for Gwilym James, Charles & Davies, Merthyr Tydfil; Lloyd-George, Roberts & Co., for Gee & Edwards, Swansea.*

W. I. C.

BRAILEY *v.* RHODESIA CONSOLIDATED, LIMITED.

[1909 B. 3095.]

WARRINGTON J.

1910

April 22, 29.

Company — Winding-up — Reconstruction — Dissentient Shareholder — Registered Office in Rhodesia—Notice of Dissent left at London Office—Waiver by Liquidator—Conflict of Law—Companies Act, 1862 (25 & 26 *Vict.* c. 89), *s.* 161—*Companies* (*Consolidation*) *Act*, 1908 (8 *Edw.* 7, c. 69), *s.* 192, *sub-s.* 3—*Evidence of Local Law.*

The plaintiff was the holder of fully paid up shares in the defendant company, which was in course of liquidation for the purposes of reconstruction. The company was registered in 1903 under the Companies Ordinance, 1895, of Southern Rhodesia, and its registered office was in Bulawayo. By the company's articles it was provided that the business of the company should be carried on in England. At extraordinary general meetings held in London on June 18 and July 3, 1909, resolutions had been passed for the voluntary winding up of the company, and all its assets were to be taken over by a new company.

Under s. 158 of the Companies Ordinance, 1895, which was similar to s. 161 of the Companies Act, 1862, a dissentient shareholder had to give notice of dissent at the registered office of the company within seven days of the date of the meeting. The plaintiff voted against the resolutions and on July 5 gave notice of dissent at the London office of the company. On July 6 the liquidator sent him in reply a letter in the following terms:—"I am in receipt of your letter of the 5th inst. and note that you do not consent to the reconstruction of the above company." Subsequently the liquidator refused to treat the notice of dissent as valid on the ground that it was not served at the registered office of the company, and the plaintiff brought this action. Under the Companies Ordinance, 1895, the liquidator had power to do all acts in the name and on behalf of the company:—

Held, that the liquidator had waived the irregularity and that the notice of dissent must be treated as valid.

Evidence of an expert in Roman-Dutch law admitted although he had not practised in Rhodesia.

The plaintiff, Mr. W. H. Brailey, was the holder of 500 fully-paid shares of 10*s.* each in the defendant company, Rhodesia Consolidated, Limited, which was now in course of liquidation for the purposes of reconstruction, and he brought this action in order to assert his rights as a dissentient shareholder under the provisions of the Companies Ordinance, 1895, of Southern Rhodesia. (1) The company was registered under that Ordinance

(1) See note, p. 103, post.

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in 1903, and its registered office was situated in Bulawayo, Rhodesia. By the articles of association of the company it was provided that (4.) "the affairs and business of the company shall so far as possible be under the control and management of the board of directors in England notwithstanding that the company is incorporated in Rhodesia"; (66.) general meetings might be held in England; (69.) general meetings might be held upon a requisition by shareholders on the requisition being deposited at the London office of the company; (158.) all members were to give to the directors an address within the United Kingdom for the service of notices, and in default thereof the London office of the company was to be deemed to be their registered address; (169.) the register of members was to be kept in England.

At extraordinary general meetings of the defendant company held in the city of London on June 18 and July 3, 1909, respectively, special resolutions were passed and confirmed to the effect that the defendant company should be wound up voluntarily with a view to its reconstruction, and that the defendant Walter Winder (a London chartered accountant) should be appointed liquidator of the defendant company for the purpose of such winding-up, and should be authorized, pursuant to s. 158 of the Companies Ordinance, 1895, of Southern Rhodesia, to enter into an arrangement with a new company to be called The Rhodesia Consolidated, Limited, or some similar name, for the sale to it of the whole undertaking and assets of the defendant company, subject to its liabilities, in consideration of the allotment of shares in the new company in accordance with the terms of a certain scheme of reconstruction.

The notices of these meetings were sent out from the London office of the company. By the reconstruction scheme one 10*s.* share in the new company credited with 7*s.* 6*d.* paid was to be offered to the present shareholders for each share held by them in the old company, and the shareholders were informed that their claims for shares must be sent in by July 27, 1909, or they would lose all right to an allotment.

Under s. 158 of the Companies Ordinance of 1895, which was almost identical in terms with s. 161 of the Companies Act, 1862, re-enacted in s. 192 of the Companies (Consolidation) Act, 1908,

where a company was being wound up voluntarily and its business and property were to be transferred to another company, a shareholder who dissented from the special resolutions for reconstruction and had not voted for them, and had expressed his dissent in writing left at the registered office of the company not later than seven days after the date of the meeting at which the resolutions were passed, might call upon the liquidator to abstain from carrying the resolutions into effect or to purchase the interest of the dissentient member. Inasmuch as the registered office of the company was in Rhodesia, it was impossible for the plaintiff to leave an expression of his dissent in writing at that office within seven days of the meeting.

The plaintiff voted against the resolutions and on July 5 wrote a letter to the liquidator as follows:—

"Being a shareholder to the extent of five hundred ordinary shares in the above company, I beg to inform you that I do not consent to the reconstruction. I hereby call upon you either to stop the reconstruction or to purchase my shares at a fair valuation. According to the various statements of the directors fifteen shillings each would be a fair sum and I hereby offer to accept this sum if paid within a month from date."

On July 6 the liquidator sent him the following answer:—

"I am in receipt of your letter of the 5th inst. and note that you do not consent to the reconstruction of the above company."

Further correspondence ensued, and the plaintiff threatened to take legal proceedings to enforce his rights, and on July 30 the liquidator wrote to the plaintiff's solicitors as follows:—

"I have referred your client's letter of the 5th inst. to my solicitors, who inform me that I am not entitled to act upon it as it does not comply with s. 158 of the British South Africa Company's Ordinance of 1895.

"Under these circumstances you may prefer to apply for your relative shares in the new company, and I shall have pleasure in procuring you an allotment if you should do so within seven days from this date.

"Failing this I am afraid I can do nothing more in the matter than send you your proportion of any sum that I may be able to realize for rights to apply for the undistributed shares."

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The plaintiff brought this action against the company and the liquidator, claiming a declaration that by virtue of his notice of dissent he was entitled to the rights of a dissentient shareholder under the Ordinance; an injunction to restrain the defendants from parting with the assets without making provision for his interest; and in the alternative for damages.

A. F. Topham, for the plaintiff. The plaintiff has substantially complied with the requirements of s. 158 by bringing his dissent to the notice of the liquidator, who has accepted it. It was impossible for the plaintiff to leave his notice at the registered office of the company in Bulawayo within the time limited by the section. The words "at the registered office of the company" were inserted for the convenience of shareholders in order that they might know where to send their notices. That being so, it was competent to the liquidator to waive the requirement in this case, as he in fact did.

The right of the plaintiff as a shareholder must be determined in accordance with the law of Rhodesia, and under that law the provision of the statute was sufficiently complied with. But even if that is not so, the plaintiff has an equity against the company. The company has put the plaintiff to rest by accepting his notice and cannot now turn round and say that it is invalid: *British South Africa Co.* v. *De Beers Consolidated Mines, Ld.* (1); *In re London and Westminster Bread Co.* (2)

H. Terrell, K.C., and *Arthur Sims* (*Gore-Browne, K.C.*, with them), for the defendants. The liquidator has no power to waive the provisions of the statute. The requirement as to notice is a condition precedent, and unless the plaintiff complies with the condition he has no rights. The Court is bound to give effect to the statute. No right arises under the statute unless the plaintiff has complied with its requirements, however difficult it may be to comply with them: *Burdett-Coutts* v. *True Blue* (*Hannan's*) *Gold Mine.* (3)

The liquidator had no power, express or implied, to waive this

(1) [1910] 1 Ch. 354, 387. (2) [1890] W. N. 3; 59 L. J. (Ch.) 155.
(3) [1899] 2 Ch. 616, 628.

condition; he could not give the plaintiff these rights as against assenting shareholders. The assets do not belong to the liquidator and he cannot give them away.

[WARRINGTON J. Can a Rhodesian company deprive dissentient shareholders of their rights by passing resolutions in England?]

If they passed them in Rhodesia a shareholder in England would be in the same difficulty, for notice could only be given by cable. The statute must be construed strictly: *In re Union Bank of Kingston-upon-Hull.* (1)

WARRINGTON J. I need not trouble you, Mr. Topham.

The plaintiff is a shareholder in the defendant company, Rhodesia Consolidated, Limited, and he seeks in this action to assert his rights as what is generally known as a dissentient shareholder in the proposed reconstruction of the company.

Now the facts are these. The company was registered under the Companies Ordinance of the Colony of Rhodesia. Its registered office is at Bulawayo, but the articles contain elaborate provisions for the management of the business in England, for giving notices to the company in England, and generally providing that the company shall be treated, so far as it lawfully can be treated, as an English company, although it is incorporated under the laws of Rhodesia and has its registered office in Rhodesia. The plaintiff applied for and was allotted 500 shares. Those shares were fully paid up. Now under those circumstances in June of last year the directors of the company contemplated a reconstruction of the company, and a notice dated June 10 was issued from the office of the company in London of an extraordinary general meeting to be held in London for the purpose of approving the proposed reconstruction scheme, and one of the resolutions to be submitted provided for the appointment of a London chartered accountant as liquidator. Amongst the proposals involved in the reconstruction was the provision that the shares to be taken by the shareholders of what would then be the new company, in lieu of their paid-up shares in the old company, were to have a liability attached to them of 2*s.* 6*d.* each share. It was the usual thing: they tried to force the

(1) (1880) 13 Ch. D. 808.

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shareholders in the old company to contribute more than they were originally bound to contribute; or, failing that, lose their shares. The plaintiff attended the meeting of the company; he spoke against and voted against the resolutions. The second meeting was held for the purpose of passing a confirmatory resolution on July 3. On July 5 the plaintiff wrote to the liquidator this letter. [His Lordship read the correspondence, and continued:—]

The Companies Ordinance, 1895, of Rhodesia is modelled on the Companies Act of 1862, and it contains a section referring to reconstruction which is to all intents and purposes the same as s. 161 of the Companies Act, 1862. It provides, as s. 161 does, for the transfer of the assets of the company being reconstructed to a new company, in consideration of shares, and then it goes on to provide: [His Lordship read the proviso under which a dissentient shareholder has to express his dissent in writing at the registered office of the company within seven days of the date of the meeting, and continued.] It is said that the shareholder is debarred from his rights as a dissentient shareholder because the notice, which was in every respect sufficient, was not left at the registered office in Bulawayo within seven days of the passing of the resolution in London.

Now, under the circumstances of this case, am I bound to give effect to what seems to me a monstrous injustice? In the first place, what is the meaning and intention of inserting in the section the condition that the notice shall be left at the registered office of the company? It is not for the benefit of the liquidator, because the notice left at the registered office of the company need not reach the liquidator at all. It seems to me that the provision referring to the leaving of the notice at the registered office of the company, if inserted for the benefit of anybody, is for the benefit of the dissentient shareholder, in order that he may not have the difficulty of proving the actual receipt by the liquidator of the notice which he has addressed to him. It is sufficient for him to prove that that notice has been left at the registered office of the company, and he need not go further and shew that the liquidator has received it. But whatever view may be taken of that, it seems to me

quite plain that the leaving of the notice at the registered office of the company cannot, on the true construction of the Act, be treated as an essential condition. It is quite true that it is a condition, but it is a condition the omission of which under such circumstances as the present has had no effect, prejudicial or otherwise, upon either the liquidator or the assenting shareholders in the company. That has a most material bearing on the point which I think decides this case in favour of the plaintiff, and that is that under the circumstances of this case the liquidator has waived the requirement and accepted the notice which was given to him as a sufficient notice.

It is said that the liquidator has no power to waive any provision in this section, however trifling and however immaterial that provision may be, and that, if the shareholder fails to comply *modo et forma* with the provision laid down, the liquidator cannot accept a notice which departs one hair's breadth from the conditions. From that doctrine I entirely dissent. By s. 132, sub-ss. 4 and 7, of the Ordinance, which deals with the power of the liquidator, it is provided that the liquidator may, without the sanction of the Court, exercise all powers by this Ordinance given to the official liquidator. By s. 99 it is provided that "the official liquidator shall have power, with the sanction of the Court, to do the following things," and amongst them, "to do all acts, and to execute, in the name and on behalf of the company, all deeds, receipts and other documents, and for that purpose to use, when necessary, the company's seal." I have no doubt the company has power to waive a requirement such as that of the 158th section, and if the company has the power to do it, the liquidator has power to do that which might be done by the company. I do not mean to say that a liquidator would be justified in waiving an essential condition without getting, as he could get if he were a voluntary liquidator, the sanction of the Court to his so doing, but where, as in this case, there is a condition which is entirely unessential, and an objection to the notice which is wholly technical, with no substance whatever in it, then I am clearly of opinion that the liquidator had power under the Rhodesian Ordinance to waive the condition and accept the notice which was given to him as sufficient notice.

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Now has he accepted the notice? In my opinion he has. I think no one can read his letter of July 6 without seeing that it was intended to be read by the plaintiff as an acceptance of that notice. He says, "I am in receipt of your letter and note that you do not consent to the reconstruction of the above company"; that means to say, "I take note that you have expressed your dissent, and that you desire to be treated as a dissentient member." After that, and after having, without objection, allowed the seven days to pass within which it was just possible by cable to communicate the notice of dissent to Rhodesia—having allowed those days to pass without having raised the objection, in my judgment the Court is bound to hold that the liquidator, to use an expression appropriate to rather a different order of documents, has "accepted service." The notice has got to him and he is the only person concerned with it; he says he has accepted it, and he notes the position which the plaintiff takes up. If that is not acceptance of service I do not know what is.

On the whole I think the plaintiff is entitled to succeed, and to be treated as a dissentient shareholder, to a declaration to that effect, and an injunction to restrain the defendants from parting with the assets of the company without making adequate provision for the purchase of the plaintiff's interest therein in manner provided by the Ordinance.

Just one word more. There may be a question whether this case ought to be decided by English law or by Rhodesian law. I will assume, notwithstanding that every transaction material to the case took place in England, that, as the company is incorporated in Rhodesia, the rights of the shareholders might be interpreted by Rhodesian law. If that is so, I have no doubt, on the evidence which has been called before me, that the Rhodesian law would be the same as the English law, that the Rhodesian Courts would give effect to those principles of construction and those principles of common justice which are the principles to which I have tried to give effect in dealing with this case. The expert who was called on Rhodesian law was in my opinion a sufficient expert to prove that fact. It is quite true he is not actually practising in Rhodesia, but he is the Reader in

Roman-Dutch Law for the Incorporated Council of Legal Education; he has made a special study of Roman-Dutch law as applicable to our Colonies for the purpose of instructing in that law the students here who will practise in those Colonies, and I think his position as an expert was quite sufficiently proved. With regard to the facts that he proved, he to my mind proved without doubt that the Rhodesian Courts would on such a matter as this be guided—of course not bound—by the decisions of the English Courts, and, in particular, he said he knew of no rule or authority in Rhodesian law which would prevent the Court from holding that there might be a waiver of such a condition as this. The defendants must pay the costs of the action.

NOTE.—The material sections of the Companies Ordinance, 1895, were as follows:—

"99. The official liquidator shall have power, with the sanction of the Court, to do the following things:—

(1.) To bring or defend any action, suit, or prosecution, or other legal proceeding, civil or criminal, in the name and on behalf of the company.

(2.) To carry on the business of the company, so far as may be necessary, for the beneficial winding-up of the same.

(3.) To sell the moveable and immoveable property, effects and things in action of the company by public auction or private contract, with power to transfer the whole thereof to any person or company, or to sell the same in parcels.

(4.) To do all acts, and to execute, in the name and on behalf of the company, all deeds, receipts and other documents, and for that purpose to use, when necessary, the company's seal."

"132. The following consequences shall ensue upon the voluntary winding-up of a company:—

(1.) The property of the company shall be applied in satisfaction of its liabilities, in the legal order of their preference, and, subject thereto, shall, unless it be otherwise provided by the regulations of the company, be distributed amongst the members, according to their rights and interests in the company.

(2.) Liquidators shall be appointed for the purpose of winding up the affairs of the company, and distributing the property.

(3.) The company in general meeting shall appoint such persons or person as it thinks fit to be liquidators, and may fix the remuneration to be paid to them.

(4.) If one person only is appointed, all the provisions herein contained, in reference to several liquidators, shall apply to him.

(5.) Upon the appointment of liquidators, all the powers of the directors shall cease, except in so far as the company, in general meeting, or the liquidators, may sanction the continuance of such powers.

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(6.) When several liquidators are appointed, every power hereby given may be exercised by such one or more of them, as may be determined at the time of their appointment, or in default of such determination, by any number not less than two.

(7.) The liquidators may, without the sanction of the Court, exercise all powers by this Ordinance given to the official liquidator."

"158. Where any company is proposed to be or is in the course of being wound up voluntarily, and the whole or a portion of its business or property is proposed to be transferred or sold to another company, the liquidators of the first mentioned company may, with the sanction of a special resolution of that company, conferring either a general authority on the liquidators or an authority in respect of any particular arrangement, receive, in compensation, or part compensation, for such transfer or sale, shares, policies or other like interests in such other company, for the purpose of distribution amongst the members of the company being wound up, or may enter into any other arrangement whereby the members of the company being wound up, may, in lieu of receiving cash, shares, policies or other like interests, or in addition thereto, participate in the profits of or receive any other benefit from the purchasing company; and any sale made or arrangement entered into by the liquidators in pursuance of this section shall be binding on the members of the company being wound up; subject to this proviso, that if any member of the company being wound up who has not voted in favour of the special resolution passed by the company of which he is a member at either of the meetings held for passing the same expresses his dissent from any such special resolution in writing, addressed to the liquidators or one of them, and left at the registered office of the company not later than seven days after the date of the meeting at which such special resolution was passed, such dissentient member may require the liquidators to do one of the following things as the liquidators may prefer: that is to say, either to abstain from carrying such resolution into effect, or to purchase the interest held by such dissentient member at a price to be determined in manner hereinafter mentioned, such purchase-money to be paid before the company is dissolved, and to be raised by the liquidators in such manner as may be determined by special resolution; no special resolution shall be deemed invalid for the purposes of this section by reason that it is passed antecedently to or concurrently with any resolution for winding up the company, or for appointing liquidators; but if an order be made within a year for winding up the company by the Court, such resolution shall not be of any validity unless it is sanctioned by the Court."

Solicitors: *Carter & Barber, for C. B. Brill, Brighton; Birkbeck, Moreton, Thompson & Co.*

H. C. R.

GREEN *v.* CORPORATION OF HACKNEY.

NEVILLE J.

1910

April 27, 28.

[1910 G. 103.]

London—Metropolis Management—Widening Street—Notice to treat for "part of" a Factory—Invalid Notice—Injunction—Michael Angelo Taylor's Act, 1817 (57 *Geo.* 3, *c. xxix.*), *s.* 80.

A local authority requiring part of a factory for the purpose of widening a street cannot under Michael Angelo Taylor's Act compel the owner to sell such part only, if the removal of that part will substantially injure the factory so that it can no longer be used and enjoyed as it was before, even if the part that would be left would be a substantial building which would with some alteration and rearrangement be capable of being efficiently used as a factory, though with some diminution in area and output.

The ruling of Stirling J. in *Gibbon* v. *Paddington Vestry*, [1900] 2 Ch. 794, 802, discussed and applied.

ACTION.

This was an action to restrain the defendant corporation from proceeding with two notices to treat that they had given under 57 Geo. 3, c. xxix., in these circumstances:

The plaintiff Green was the lessee of a boot and shoe manufactory situate on the west side of Mare Street in the metropolitan borough of Hackney and known as Nos. 79 and 81, Mare Street, and he held the factory for the unexpired residue of a term of twenty-one years from December, 1906, under a lease granted to him by the plaintiff Ewin, who was the freeholder of the premises. The factory consisted of two old houses fronting Mare Street with extensive modern buildings covering all the land in the rear thereof, and it had a frontage to Mare Street of about 35 feet and extended in depth for about 194 feet, and it also extended some 46 feet at the rear of and parallel with the back garden walls of the three adjoining messuages Nos. 83, 85, and 87, Mare Street. The plaintiff Green carried on an extensive business at the factory, where on an average about 1000 pairs of boots and shoes were turned out per day. The factory was so arranged that the whole of the processes in the manufacture of boots and shoes, from the cutting out of the tanned leather and other raw material

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down to the packing of the completed boots and shoes ready for delivery to the trade, were carried out at the factory, and the whole of the factory was used for these operations, which were continuous. The plaintiff Ewin was the freeholder of the factory and also of the three adjoining messuages Nos. 83, 85, and 87 with their small gardens.

In October, 1909, the defendants, in exercise of the powers conferred on them by s. 80 of 57 Geo. 3, c. xxix., passed a resolution to widen Mare Street, and adjudged that "the lands in the said street coloured red on the plan signed by the mayor" projected into, obstructed, or prevented them from widening the said street, and that "the possession, occupation and purchase of the said lands shewn by the red colour on the signed plan" would be necessary for that purpose.

In pursuance of this resolution the defendants in December, 1909, served the plaintiff Green with a notice to treat for the sale to them of his interest in "so much of the lands shewn by the red colour on the signed plan" as were described in the schedule thereto; and in the schedule the lands intended to be acquired by the defendants were described as "part of a manufactory including entrance, lobby, office, packing room, store rooms and machine room," and situated "Nos. 79 and 81, Mare Street." This part of the factory comprised the greater portion of the two old houses fronting Mare Street and extended in depth about 19 feet.

In further pursuance of the resolution the defendants in January, 1910, served the plaintiff Ewin with a notice to treat for the sale to them of his interest in "so much of the lands shewn by the colour red on the signed plan" as were described in the schedule thereto; and in the schedule the lands intended to be acquired by the defendants were described as "part of factory Nos. 79 and 81, Mare Street" and part of the houses, shops, areas, and yards of Nos. 83, 85, and 87, Mare Street. The part of the factory comprised in the plaintiff Ewin's notice was the same as that comprised in the plaintiff Green's notice. The plaintiffs objected that the defendants were not entitled to take the parts only of the premises comprised in the notices, and, on the defendants intimating their intention to proceed with the

notices under s. 82 of the Act, they brought this action claiming an injunction as stated above.

In their statement of claim the plaintiffs alleged that, if the defendants were allowed to proceed with the notice to treat served on the plaintiff Green, the part of the factory not comprised in the notice would be totally inadequate for the plaintiff Green's said business and would not constitute a house or building capable of being used in the same manner as hitherto and with substantially the same result and convenience; that if part of the factory was taken as proposed by the defendants the factory as a factory would be destroyed and rendered useless for the purposes of his business as now carried on by him. And as to Nos. 83 to 87, Mare Street the plaintiff Ewin alleged that if the defendants were allowed to proceed with their notice to treat served on him the respective portions of such messuages left to him would be of an average depth of three feet without any front wall, and could not be used for any purpose except possibly as advertising stations.

The defendants by their defence offered to purchase the whole of the plaintiff Ewin's interest in Nos. 83 to 87, Mare Street, but he declined the offer as he did not desire to sell his property. And with regard to the factory the defendants denied the allegations of the plaintiffs, and alleged that, without any other alterations of a structural character beyond making good those parts of the premises which would necessarily have to be reconstructed on the removal of the parts proposed to be taken, it was possible to rearrange the remainder of the premises in such a way that the same would be capable of being used as a complete and efficient building for the manufacture of boots and shoes in the same manner as theretofore, though on a slightly smaller scale. The action now came on for trial, and the evidence is sufficiently noticed in the arguments and judgment.

Butcher, K.C., and *Courthope-Munroe*, for the plaintiffs. On our evidence, if the defendants are allowed to act on these notices the effect will be to destroy the value of the factory as now used and worked and enjoyed by the plaintiff Green, and as regards the plaintiff Ewin to destroy the three adjoining houses

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and their value as houses; and that, on the authorities, entitles the plaintiffs to restrain them from taking "part of" either factory or houses under the notices they have given, because the enjoyment of the factory and of the houses will be materially injured by taking the part: *Gordon* v. *Vestry of St. Mary Abbotts, Kensington* (1); *Gibbon* v. *Paddington Vestry* (2); *Thompson* v. *Hammersmith Corporation* (3); *Denman & Co.* v. *Westminster Corporation* (4); and the defendants, having adjudicated under the Act that part only of each of the three houses is wanted, cannot now, without rescinding that adjudication and making a new one, compulsorily take the whole of the three houses.

Peterson, K.C., and *Attwater*, for the defendants. The evidence for the defendants will go to shew that, if the part of the factory mentioned in the notices to treat is taken, it will leave a large and substantial building which, with a little alteration and rearrangement, is capable of being efficiently used as a factory, although there would be some diminution in floor space and to that extent some diminution in output, which, however, might be met by compensation.

[NEVILLE J. It appears to me that the evidence is irrelevant, but I will take it if you like. I propose to follow the ruling of Stirling J. in *Gibbon* v. *Paddington Vestry* (2), and what I am going to ask myself is this: whether the factory was substantially injured, and whether it could be no longer enjoyed as it was before. The statute says that if an authority find a house obstructing, or any part of it obstructing, they may give notice to take the house. That has been held to mean that they may take the house or any part of it. But it has also been held that "or any part of it" means any part which is not a substantial part, or, as Stirling J. puts it, any part that "can be fairly called a part." It has been held further that whether the authority are to take a substantial part or the whole is at the election of the owner; that is to say, if they want to take a substantial part and he says "No," they have to take the whole. But if they want to take the whole and he says "No, take a substantial part," they have to take a substantial part. It seems

(1) [1894] 2 Q. B. 742, 754.
(2) [1900] 2 Ch. 794, 802.
(3) [1906] 1 Ch. 299, 307.
(4) [1906] 1 Ch. 464, 478.

to me a conclusion founded on common sense that the authority are only to take so much as they require, and are not entitled to take more than is necessary for the purpose of widening their street. Whether that was expressed by the Legislature is another question. But that is immaterial now, because the statute has received judicial interpretation. That is what I understand the law to be, and I think it is put as well as it can be by Stirling J. if we leave out "what can fairly be called a part" (which I think is a little difficult). I do not think it is any answer to say "Yes, we have taken a substantial part, but you could build a factory on the part that we have left which would enable you to carry on business. It is true it will not be precisely the same business as before, but it will be a business which is good enough for you."]

We formally tender the evidence. In *Gard* v. *Commissioners of Sewers of the City of London* (1) it was held that, if a local authority propose to take for the widening of a street more than is necessary for that purpose, the adjudication and notice will be bad; and if, when a local authority adjudicate and give notice in respect of only that part which is necessary for the widening of the street, the owner can get an injunction on the ground that they have not given notice to take enough, they will be in a hopeless dilemma, and can never tell what notice to serve. It is submitted that it is a question really of degree in each case, and that the true test is whether, when part is proposed to be taken, what will be left is capable of being made a house or a factory as the case may be: *Gordon* v. *Vestry of St. Mary Abbotts, Kensington* (2); *Denman & Co.* v. *Westminster Corporation* (3); *Wild* v. *Woolwich Borough Council.* (4) In *Gibbon* v. *Paddington Vestry* (5) Stirling J. apparently considered himself bound by the observations in the judgments in *Gordon* v. *Vestry of St. Mary Abbotts, Kensington* (2), but the decision in that particular case did not affect the question that was really before him, and the observations that he thought binding upon him were in fact obiter dicta.

Butcher, K.C., in reply.

(1) (1885) 28 Ch. D. 486.
(2) [1894] 2 Q. B. 742, 751.
(3) [1906] 1 Ch. 464, 479.
(4) [1910] 1 Ch. 35, 38.
(5) [1900] 2 Ch. 794.

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NEVILLE J. The question that has to be decided in this case is whether the local authority were justified in giving the notices to treat which they did in respect of the houses numbered 79, 81, 83, 85, and 87, Mare Street. Now that street is to be widened, and the authority have given notice to take the parts of the houses which are coloured red upon the plan which is annexed to the notices to treat. That plan shews what is proposed to be done. With regard to Nos. 83, 85, and 87, it is obvious that no part of those houses, except the back wall and a foot or two in front of it, would be left, and it seems to me quite impossible to say, taking the definition in Stirling J.'s judgment in the case of *Gibbon* v. *Paddington Vestry* (1), that that can be right. He puts it in what seems to me to be the right way. He says, in considering whether a local authority are entitled to take part of a house, "If, for example, there is a porch or a conservatory, or a cellar, which can be removed without substantially destroying the house as a house, that, according to the decision, may be taken; but if, on the other hand, a substantial portion is taken by the authority, so that the use of the house is substantially injured and can no longer be enjoyed as it was before, then it seems to me that it is laid down that the whole must be taken." Therefore, with regard to Nos. 83 to 87, I do not think that any question can be seriously raised. Then with regard to Nos. 79 and 81, they are now used as a factory which extends some 194 feet to the rear and covers the areas shewn on the plan put in by the plaintiffs. It is said that, notwithstanding the abstraction of from 18 to 20 feet of the front of those two houses, which are houses of several storeys, what is in effect a house will still be left, because by some readjustment and alteration a factory which could still be utilized is left, although it is admitted that it would not be the same factory. But it is argued upon the authorities that, notwithstanding that, the local authority are nevertheless still entitled under Michael Angelo Taylor's Act to take the part which they propose to take. Applying the ruling of Stirling J. to which I have referred, it seems to me that the use of this factory, part of which comprises Nos. 79 and 81, is substantially

(1) [1900] 2 Ch. 802.

injured by what is proposed to be done, and that it could no longer be enjoyed as it was before. Therefore the notices are in my opinion bad. I must therefore grant the injunctions asked for restraining the defendants from proceeding with the notices, and they must pay the costs of the action.

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Solicitors for plaintiffs: *Bramall & White.*
Solicitor for defendants: *Edward Tanner.*

H. L. F.

In re WILMER'S TRUSTS. WINGFIELD *v.* MOORE.

PARKER J. 1910 *May* 10.

[1909 W. 3411.]

Estate Tail—Disentailing Assurance—Protector of Settlement—Consent where himself the Disentailing Tenant in Tail—Fines and Recoveries Act, 1833 (3 & 4 *Will.* 4, *c.* 74), *ss.* 34, 42.

By the will of a testatrix who died in 1880 realty was devised in trust (in the events which happened) for M. for life, with remainder in trust for his first and other sons successively in tail male, with remainder in trust for M. in tail, with certain remainders over in trust for other persons. M. was advised in 1902 that the sons' estates in tail male were void for remoteness and that he was entitled as tenant in tail male or tenant in tail in possession, and by a disentailing deed executed by him shortly afterwards, after reciting the will, the advice given to him, and that he was desirous of barring his estate in tail male and all other his estates in tail and all other estates, interests, and powers to take effect after the determination or in defeasance thereof, he conveyed the real estate to a grantee to the use of himself in fee simple, discharged from all his estates in tail male or in tail and all estates, rights, interests, and powers to take effect after the determination or in defeasance of such estates in tail male or in tail. The deed contained no separate consent by M. as protector of the settlement.

In 1903 it was decided that the estates in tail male of the sons of M. were not void, and that he took in the first place only an estate for life: *In re Wilmer's Trusts, Moore* v. *Wingfield*, [1903] 2 Ch. 411. M. died in 1909 without issue:—

Held, that the execution of the disentailing assurance by M. operated as a consent by him as protector of the settlement, that the estates in remainder on his own estate in tail were barred, and that he took the property in fee simple subject to his own life estate.

ANNE WILMER WILMER by her will, dated September 25, 1876, devised all her residuary estate unto and to the use of J. H. L.

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Wingfield and E. Wingfield, their heirs and assigns, upon the trusts and with and subject to the powers, provisoes, and declarations thereinafter declared and contained concerning the same, and she bequeathed all her residuary personal estate unto the same persons, their executors, administrators, and assigns, upon trust to sell, call in, and convert into money such part of the residuary personalty as should not consist of money and to invest the proceeds and the part consisting of money in the purchase of lands or hereditaments in England, Wales, or Ireland and to cause the lands and hereditaments so purchased to be conveyed to and vested in the trustees or trustee for the time being, their or his heirs or executors, administrators, and assigns, according to the tenure thereof, upon the trusts and with and subject to the powers, provisoes, and declarations thereinafter declared and contained concerning the same. And the testatrix thereby declared that her trustees should stand seised and possessed of her residuary real estate and of the freehold and copyhold lands and hereditaments to be purchased as aforesaid (all thereinafter collectively referred to as "the Wilmer estate") upon trust to pay the income thereof to Anna Maria Moore during her life, and after her death to stand possessed of the Wilmer estate "upon trust for the second and every younger son of the said Anna Maria Moore born or to be born successively during his life without impeachment of waste, with remainder after the death of each such son upon trust for his first and other sons successively in order of seniority in tail male, so that every elder (except the eldest) son of the said Anna Maria Moore, born or to be born, and his first and other sons and their issue male respectively shall take before every younger son of the said Anna Maria Moore and his first and other sons and their issue male respectively, with remainder in trust for the second and every other son (except the eldest son) of the said Anna Maria Moore successively in order of seniority in tail, with remainder in trust for all the daughters of the said Anna Maria Moore as tenants in common in tail in equal shares, with cross remainders in tail between or among them if more than one," with certain remainders over.

The will also provided that if any person (other than the eldest

son of A. M. Moore and the issue of such eldest son) to or in trust for whom any estate for life or in tail male or in tail in the Wilmer estate or any share thereof was thereby devised should be at the death of the testatrix or afterwards should become entitled to an estate called "the Barne estate," then the Wilmer estate or such share thereof was to go over and be held upon the same trusts as if the person so becoming entitled to the Barne estate had died without issue.

On October 28, 1880, the testatrix died, and prior to that time A. M. Moore had had four daughters (all of whom were living), a son called Stephen Wilmer Moore, who was born in 1868 and died in 1877, a son called Randall Kingsmill Moore, born February 12, 1873, and a son called Stephen Thomas Moore, born February 7, 1881, and en ventre sa mère at the time of the testatrix's death.

R. K. Moore subsequently became entitled to the Barne estate.

A. M. Moore died intestate on December 22, 1886.

S. T. Moore on attaining the age of twenty-one years in February, 1902, was advised that, as he was en ventre sa mère when the testatrix died, the estates tail limited to his sons were void for remoteness, and that he was possessed of or beneficially entitled to the realty and personalty as tenant in tail male or tenant in tail in possession.

On September 5, 1902, S. T. Moore executed a disentailing assurance, which was duly enrolled. By this deed, after reciting the will of A. W. Wilmer, the date of S. T. Moore's birth, that he was advised that upon the true construction of the will and in the events that had happened he was possessed of or beneficially entitled to the residuary real and personal estate of the testatrix as tenant in tail male or tenant in tail in possession, and that he was desirous of barring the estate in tail male and all other estates in tail of him the said S. T. Moore in the said hereditaments and premises and all other estates, interests, and powers to take effect after the determination or in defeasance thereof and of assuring or limiting the same in manner thereinafter expressed, it was witnessed that S. T. Moore granted to one Foster "All and singular the freehold hereditaments and

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premises specified in the first schedule to these presents and all other if any the residuary real estate of the said testatrix and all other (if any) the freehold hereditaments of which the said Stephen Thomas Moore is now by any means tenant in tail male or in tail at law or in equity under or by virtue of the said will or otherwise," to hold the same unto Foster and his heirs, to the use of and in trust for S. T. Moore, his heirs and assigns, for ever, "discharged from all estates in tail male or in tail of the said Stephen Thomas Moore at law or in equity and all estates, rights, interests and powers to take effect after the determination or in defeasance of such estates in tail male or in tail." By the same deed leasehold hereditaments, investments and moneys, and investments and moneys subject to investment in land of which S. T. Moore would under the will be tenant in tail male or in tail were assigned to Foster discharged from all estates in tail male or in tail as aforesaid and all estates, rights, interests, and powers to take effect after the determination or in defeasance of such estates in tail male or in tail, in trust for S. T. Moore, his executors, administrators, and assigns, as personal estate.

In 1903 it was decided that the limitations in the will of A. W. Wilmer did not transgress the rule against remoteness, that the sons of S. T. Moore took valid estates in tail male in remainder, and that he took an immediate life estate in the property: *In re Wilmer's Trusts, Moore* v. *Wingfield.* (1)

S. T. Moore afterwards took the name of Stephen Thomas Wilmer and died without issue on May 17, 1909, his four sisters surviving him; and an originating summons was taken out by the trustees for the time being of A. W. Wilmer's will for the determination of the question whether under the disentailing deed and in the events which had happened S. T. Wilmer became entitled to the Wilmer estate for an equitable estate of inheritance in fee simple in possession or only acquired or became entitled in equity to a base fee in that estate.

The defendants were the four sisters of S. T. Wilmer, the daughters of Anna Maria Moore, and the executors of S. T. Wilmer's will.

(1) [1903] 1 Ch. 874; affirmed [1903] 2 Ch. 411.

A. Grant, K.C., and *T. T. Methold*, for the plaintiffs.

Martelli, K.C., and *Sargant*, for two daughters of Anna Maria Moore. S. T. Wilmer was not only tenant for life and protector of the settlement, but was tenant in tail in remainder on the tenancy in tail male given to his first and other sons successively. By s. 22 of the Fines and Recoveries Act, 1833, if, when there is a tenant in tail of lands under a settlement, there is subsisting in the same lands, under the same settlement, an estate for years determinable on the dropping of a life or lives, "or any greater estate" (not being an estate for years) prior to the estate tail, then the owner of the prior estate is the protector of the settlement. S. T. Wilmer was therefore the protector of the settlement. By s. 34 of the same Act, if at the time when any person, actual tenant in tail, is desirous of making a disposition of the land entailed there is a protector of the settlement, "then and in every such case the consent of such protector shall be requisite to enable such actual tenant in tail to dispose of the lands entailed to the full extent to which he is hereinbefore authorized to dispose of the same." By s. 36 devices with a view to controlling the exercise of his power to consent are void. By s. 37 the rules of equity in relation to dealings and transactions between the donee and the object of a power are not to apply to dealings and transactions between a protector and a tenant in tail on the former giving his consent to a disposition by the latter. By s. 42 "the consent of the protector of a settlement to the disposition under this Act of a tenant in tail shall be given either by the same assurance by which the disposition shall be effected, or by a deed distinct from the assurance, and to be executed either on or at any time before the day on which the assurance shall be made, otherwise the consent shall be void." By s. 47 the Courts are debarred from giving relief in cases of disposition of tenants in tail or consents by protectors by supplying defects in execution. In order to bar the estates tail in remainder the consent of S. T. Wilmer, as protector, was necessary. He never gave that consent. Moreover, he never intended to bar anything except the particular estate tail to which he erroneously believed, and was advised, on the cypres principle of which *Monypenny* v. *Dering* (1)

(1) (1852) 2 D. M. & G. 145.

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is an example, he was entitled. A grant by a tenant in tail freed from all her estates tail and all remainders or reversions expectant or dependent thereon does not bar any estate tail except one to which it is recited that she is advised that she is entitled, and which she shews a desire to bar: *Grattan* v. *Langdale.*(1)

Sect. 47 does not deal with the case of a contract to execute a disposition under the Act, but with a deed intended to be operative under it but which from some defect is not so operative: *Bankes* v. *Small.* (2)

Romer, K.C., and *Wright Taylor*, for the other daughters of Anna Maria Moore. It is necessary that the protector's consent should be expressed in the disentailing assurance, and in this case it has not been so expressed. The fact that he was a party to the deed is only something from which the consent may be inferred. *Tuffnell* v. *Borrell* (3) is distinguishable, as it was decided on special grounds. The protector's consent was never given to the barring of his sister's estates tail, and as regards these he never exercised the discretion required by s. 36 of the Act.

Buckmaster, K.C., and *Austen-Cartmell*, for the executors of S. T. Wilmer. There was a recital in *Grattan* v. *Langdale* (1) that the tenant in tail wished to bar the estate tail to which she was advised she was entitled, which was the only one mentioned in the recital. The recital here shews an intention to bar all the estates tail, and it cannot therefore be contended that S. T. Wilmer had not these in his mind when he executed the disentailing assurance. That instrument is expressed in the widest terms and shews a complete consent as protector.

PARKER J. The question arising for decision in this case is, what is the effect of a deed dated September 5, 1902, which was executed and enrolled, and designed to take effect as a disentailing assurance?

At the date of that deed Stephen Thomas Moore was, under the limitations contained in a will, tenant for life of certain

(1) (1883) 11 L. R. Ir. 473, cited in Norton on Deeds, p. 275.

(2) (1887) 36 Ch. D. 716, 723.

(3) (1875) L. R. 20 Eq. 194.

property, with remainder to his first and other sons severally and successively in tail male, with remainder to himself in tail general, and, by reason of the fact that at the time of the death of the testatrix he was en ventre sa mère, a question had arisen whether all limitations subsequent to the life interest conferred by the will were not void for remoteness. If they were void, it was possible that, on the principle of the cyprès doctrine exemplified by *Monypenny* v. *Dering* (1), he might himself be held to be entitled to an estate tail in the property, so as to give effect as far as possible to the intention of the testatrix with regard to his children. Apparently he took advice upon the point and was advised that in the events which had happened he was either tenant in tail in possession, or tenant in tail male in possession, of the property by virtue of the cyprès doctrine, and under these circumstances he executed this disentailing deed.

Now the deed fully recites the will under which he was entitled to an interest, shewing that in the events which had happened he was entitled for life, and, subject to the estates given to his sons in tail male, that he was also entitled in remainder in tail general. It recites the date of his birth and that he had been advised that upon the true construction of the will and in the events that had happened he was possessed of or beneficially entitled to the residuary real and personal estate of the testatrix as tenant in tail male or tenant in tail in possession, and that he was desirous of barring the estate in tail male—not, as one would expect, the estate in tail male or in tail—and all other estates in tail of him the said Stephen Thomas Moore and all other estates, interests, and powers to take effect after the determination or in defeasance thereof.

The first point on that is, what did he intend to do? I think it is reasonably clear, having regard to the recitals and the circumstances which then existed, that he was desirous of barring all estates tail which he had in the property, and not only a particular estate which he was advised that he had as tenant in tail in possession. Had his intention been otherwise, I do not think

(1) 2 D. M. & G. 145.

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that we should have found the recital in precisely the form which it has taken, or the general words in precisely the form which has been used. I think it is reasonable to suppose that the draftsman of the deed had this in view, because, however certain the law may be in some respects, if there is one point upon which it is uncertain, I should think it is with reference to the application of that cyprès doctrine to which I have referred, though as a matter of fact since the date of this deed it has been held not that Stephen Thomas Moore took an estate by virtue of the cyprès doctrine, but that, in spite of all difficulties on the score of perpetuities, having regard to the fact that he was en ventre sa mère at the time of the death of the testatrix and that the child so en ventre sa mère was unascertained in this respect, that it was not certain whether it was a male or a female, the gift for life was good, and that the remainder to the sons in tail male was good, and that there was no objection at all on the ground of perpetuities.

The question therefore arises whether the deed operates to bar the estate tail in remainder which Stephen Thomas Moore had according to the express words of the will and the remainders subsequent to that estate. I think it is admitted by all parties that at any rate the deed operates to bar his own issue, and the only question which has been raised is whether it operates to bar the remainders subsequent to his estate in tail in remainder, it being contended that the consent of Stephen Thomas Moore as protector of the settlement was not obtained, and, therefore, that only a base fee was created.

The real question which I have to decide—having once decided that on the construction of the deed Stephen Thomas Moore intended to bar all estates in tail which he had in the property—is whether he, himself being the protector and the person entitled in remainder intending to bar the estate tail which he had, has succeeded in barring not only his own issue but all the remaindermen, notwithstanding the fact that it is not expressly stated in the deed that he consents to the conveyance which he himself makes. Of course, I can conceive a case in which the point might be of importance, since a tenant in tail in remainder who was also protector of the settlement might desire to create

simply a base fee and not to bar the remaindermen, and in that case a simple conveyance, without more, of the property, with the intent that the estate should be barred, would not, or might not, bar the remaindermen. But here it is perfectly clear upon the words of the deed that Stephen Thomas Moore does intend to bar the remaindermen, because he expressly says so. He says the conveyance is to be free not only from the estates tail, but from "all estates rights interests and powers to take effect after the determination of or in defeasance of such estates in tail male or in tail." Conveying, as he does, in a way which is appropriate to bar those remainders, and being himself the conveying party, it is a little difficult to say that he is not himself consenting to what he himself does or purports to do; and I can find nothing in the Fines and Recoveries Act with regard to the manner in which the consent of the protector is to be given, except that it is to be given by a deed.

Stephen Thomas Moore was protector of the settlement as well as tenant in tail, and he was a party to the disentailing deed, and it seems to me that, he having purported to convey the estate in such manner and form as to bar the remaindermen and to create more than a base fee, I must assume that he was a consenting party to what he himself did, and, therefore, that the deed does operate to bar not only the estate tail which he had, but also the remainders upon that estate tail. I hold, therefore, that Stephen Thomas Moore became, by virtue of the disentailing deed and in the events which have happened, entitled, subject to his own life interest, to the absolute fee simple in the property.

Solicitors: *Tylee & Co.; Harrison & Powell; Gedge, Fiske & Gedge; Evans, Wadham & Co.*

F. E.

C. A.
1910
May 26, 27.

In re COLUMBIAN FIREPROOFING COMPANY, LIMITED.

[0089 of 1910.]

Company—Winding-up—Debenture—Floating Charge within Three Months of Winding-up—Cash paid at the Time of Creation of Charge—Registration—Companies (Consolidation) Act, 1908 (8 *Edw.* 7, *c.* 69), *ss.* 93, 212.

Where a floating charge is created on the property of a company within three months of the commencement of the winding up of the company the question whether cash is paid "at the time of the creation of the charge" within s. 212 of the Companies (Consolidation) Act, 1908, is a question of fact to be determined by all the circumstances of the case, and as a general rule a payment on account made in consideration for the charge, although made a few days before the execution of the debenture, is made at the time of its creation.

A company being in need of funds, the directors on November 25, 1909, accepted an offer by S. to advance 1000*l.* upon the security of a floating charge on the property of the company and passed a resolution that a debenture should be prepared to be executed at the next meeting of the board. On the strength of this resolution S. paid to the company, on account of the 1000*l.*, 350*l.* immediately and a further 350*l.* on December 2. At the next meeting on December 6 the debenture was duly executed and the balance of the 1000*l.* was paid. The debenture was registered on December 23. The company went into liquidation in the following January, and the liquidator disputed the validity of the charge:—

Held, (1.) that for the purposes of s. 93 of the Companies (Consolidation) Act, 1908, the charge was created at the time when the formal instrument was executed, and that therefore it was registered within twenty-one days of its creation; (2.) that the whole of the 1000*l.* was advanced "at the time" of the creation of the charge within s. 212; consequently that the debenture was a valid security for the full amount.

Decision of Neville J., [1910] 1 Ch. 758, affirmed.

Appeal from a decision of Neville J. (1)

The company being in urgent want of money, the chairman, Mr. Sankey, at a board meeting held on November 25, 1909, offered to advance 1000*l.* upon the same being secured upon all the property of the company. This offer was accepted, and it was resolved (Mr. Sankey not voting) that a debenture to be prepared by Mr. Macdonald, the company's solicitor, should be

(1) [1910] 1 Ch. 758.

executed at the next meeting of the board. Mr. Sankey, relying on this resolution, then gave a cheque for 350*l.* on account, and on December 2 he gave a further cheque for 350*l.* At the next board meeting, held on December 6, the debenture was duly executed, and Mr. Sankey gave a cheque for 300*l.*, the balance of the 1000*l.* The debenture operated as a floating charge and was in common form. This debenture was registered on December 23. It was given for 3000*l.*, but as to 2000*l.* it was conceded that it was not a valid security. Early in January, 1910, Mr. Sankey issued a writ against the company to enforce his debenture and obtained the appointment of a receiver. On January 28 the company went into voluntary liquidation, and the question was then raised whether the debenture was a valid security for the whole or any part of the 1000*l.* having regard to ss. 93 and 212 of the Companies (Consolidation) Act, 1908. (1)

Neville J. held that the debenture was valid for the whole amount.

The liquidator appealed.

Jenkins, K.C., and *Le Riche*, for the appellant. If the resolution of November 25 when acted upon operated as an equitable charge, then the first sum of 350*l.* was advanced upon a charge which was not registered within twenty-one days of its creation

(1) Sect. 93: "(1.) Every mortgage or charge created after the first day of July nineteen hundred and eight by a company registered in England or Ireland and being" (among other things) "(*f*) a floating charge on the undertaking or property of the company, shall, so far as any security on the company's property or undertaking is thereby conferred, be void against the liquidator and any creditor of the company, unless the prescribed particulars of the mortgage or charge, together with the instrument (if any) by which the mortgage or charge is created or evidenced, are delivered to or received by the registrar of companies for registration in manner required by this Act within twenty-one days after the date of its creation, ..."

Sect. 212: "Where a company is being wound up, a floating charge on the undertaking or property of the company created within three months of the commencement of the winding up shall, unless it is proved that the company immediately after the creation of the charge was solvent, be invalid, except to the amount of any cash paid to the company at the time of or subsequently to the creation of, and in consideration for, the charge, together with interest on that amount at the rate of five per cent. per annum."

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under s. 93 of the Act of 1908. But if the two sums of 350*l.* were advanced upon the security of the debenture they were not advanced at the time of or subsequently to the creation of the charge within s. 212. On either view there is no valid charge for the full amount secured by the debenture. [They cited *In re Jackson & Bassford, Ld.* (1)]

[KENNEDY L.J. referred to Buckley on Companies, 9th ed., p. 223.]

Buckmaster, K.C., and *S. R. Earle*, for the respondent, were not called upon.

COZENS-HARDY M.R. This is an appeal from a decision of Neville J. I so entirely agree with every word that fell from the learned judge that I almost hesitate to add anything myself, but having regard to the argument which has been addressed to us I think it right that I should make one or two observations. We are dealing here with a perfectly bona fide transaction. The respondent Mr. Sankey was asked to advance 1000*l.* to the company. Upon what security was he to advance it? Upon a debenture of the company. Who was to prepare the debenture? The company's solicitor. The preparation of the debenture was a thing which could not be done in a moment. The company was so urgently in want of money that on a promise to give him the security of a debenture—that promise being evidenced by a resolution—Mr. Sankey, before actually getting the debenture itself, advanced two sums of 350*l.* Then the debenture when prepared by the solicitor was brought before a meeting of the directors of the company and the seal of the company was affixed to it, and that debenture so given was duly registered within twenty-one days. We are asked to say that these transactions, all of which took place in the interval of time between November 25, when the resolution was passed that Mr. Sankey should have a debenture, and December 6, when he got the debenture, are altogether void as to the earlier advance because the registration, although within twenty-one days from the giving of the debenture, was not within twenty-one days from the date of the first advance. I fail to find anything in the Act of Parliament

(1) [1906] 2 Ch. 467.

which can justify such a conclusion. This is simply an ordinary case in which there is an agreement for a mortgage, which takes some time to prepare, and the preparation of which may involve considerations of title and so on, and in a case like this, where the formal instrument is executed within twenty-one days from the date of the prior agreement and where that formal instrument necessarily supersedes and gives the go-by to the prior agreement, I think it would be shocking to hold that the transaction could be impeached on the ground that the security was created at the time when the money was advanced, that is to say, more than twenty-one days before the registration not of the agreement but of the security itself. I think that to lend any countenance to such a suggestion as to the meaning of s. 93 would be disastrous. Then it is said that under s. 212 the security can only be good to the extent of any cash paid to the company "at the time or subsequent to the creation" of the charge. It was conceded by counsel for the appellant that the word "at" does not mean contemporaneously with or immediately in exchange for the security or at the same moment as the security itself is created. It is a question of fact under all the circumstances of the case, Was this sum, paid, as in the present case it is proved to have been paid, a few days before the actual preparation of the debenture which was being prepared in due course by the solicitor, cash paid to the company, within the language of s. 212, at the time of the creation of the security? In my opinion it clearly was. I think therefore, for the reasons given by Neville J., that this appeal is hopeless and must be dismissed.

FARWELL L.J. I agree. In my opinion it would be disastrous if we were to strain the words of a provision like this in order to invalidate bona fide honest transactions carried out in accordance with the usual course of business. It is plain to my mind that any cash paid to the company "at the time" cannot mean on the stroke of the clock or even within the same twenty-four hours. As Neville J. has justly remarked, it is not a question of the clock; it is a question of what are the circumstances of each particular case and what is the real substance of the transaction.

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When we have once arrived at the fact that this money was paid "at the time" within the meaning of s. 212, s. 93 has no application.

KENNEDY L.J. I agree and have nothing to add.

Solicitors: *Sims & Syms; Macdonald & Stacey.*

H. B. H.

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In re WEIR HOSPITAL.

[1909 W. 037.]

Charity—Cyprès—Scheme by Charity Commissioners—Jurisdiction—Intention of Testator—Possibility of carrying out—Charitable Trusts Act, 1860 (23 & 24 *Vict.* c. 136), *s.* 2.

Funds given by a testator for a particular charitable purpose cannot be applied cyprès by the Charity Commissioners or the Court unless it is shewn to be impossible to carry out the testator's intention. They cannot be so applied because the Commissioners think some other scheme will be more beneficial than the testator's.

The Court will not overrule the Commissioners on matters of detail, but will restrain them from carrying out a scheme which is ultra vires.

A testator who died in 1902 devised to his trustees two houses upon trust to use house A. as a dispensary, cottage hospital, or convalescent home or other medical charity, to be called the Weir Hospital, for the benefit of the inhabitants of the parish of Streatham and the neighbourhood until a restrictive covenant which prevented the house B. (in which he resided) from being so used had expired, and then to use house B. in conjunction or not with house A. for the same purpose; and he gave his residuary personal estate to the same trustees for the maintenance of the hospital.

The trustees established a dispensary at the house A. and maintained it until the covenant expired in 1907. The funds then applicable for the maintenance of the charity were about 100,000*l.* The Charity Commissioners approved a scheme whereby the dispensary was to be maintained, house B. was to be turned into a home for nurses, a very small proportion of whom were to give their services gratuitously, and the bulk of the fund was to be applied in enlarging and maintaining a general hospital, called the Bolingbroke Hospital, outside and half a mile from the boundary of the parish of Streatham. This hospital was to be renamed the Weir and Bolingbroke Hospital, and a certain number

of beds were to be appropriated so as to give a preference to inhabitants of Streatham :—

Held by the Court of Appeal (reversing the decision of Eve J., [1910] W. N. 82), that the scheme was ultra vires, and the order of the Commissioners must be discharged and the matter remitted to the Commissioners for reconsideration.

In re Campden Charities, (1881) 18 Ch. D. 310, explained.

BENJAMIN WEIR, late of the Hawthorns, in Clapham Park, Streatham, in the county of London, by his will, dated October 14, 1898, appointed three trustees and devised to them his two freehold houses, No. 12, Devonshire Road, Balham, and the Hawthorns, "Upon trust to use No. 12 Devonshire Road as a dispensary cottage hospital or convalescent home or other medical charity to be called the Weir Hospital (all or any of which uses is intended to be included in the expression hospital wherever hereinafter used) for the benefit of the inhabitants of the parish of Streatham and the neighbourhood until the Hawthorns aforesaid can be used for the purpose and from and after the expiration of the restrictive covenant affecting the use of the Hawthorns aforesaid then to use the Hawthorns aforesaid for the same purpose in conjunction or not with 12 Devonshire Road as may be found desirable with power until that event to let the Hawthorns as a private residence for the best rent that can be obtained and I direct my trustees to make the necessary application under the Mortmain Act 1891 or any other Acts affecting the same for permission to retain the said freehold for the purposes aforesaid." And the testator bequeathed to the said trustees for the purposes of the hospital such of the furniture at the Hawthorns or other his residence at the time of his death and at 12, Devonshire Road as they should select as likely to be of use in the hospital, and also all his testimonials, pictures worked by his daughter, paintings by Seddall Hopkins, and any portrait of himself that he might possess, to be hung in the board room or other public room of the hospital and kept in good order and condition out of the income of the hospital; and the testator bequeathed to the said trustees all his stocks, funds, and securities of whatsoever nature upon trust out of the said income to pay certain annuities and to apply the residue of the said income for the support and maintenance of the

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hospital. And the testator gave all the residue of his estate to the said trustees upon trust to sell and convert and after payment of debts, legacies, and funeral expenses to invest the proceeds and stand possessed thereof upon trust for the support and maintenance of the Hospital, but he directed and declared that so long as the hospital was carried on at 12, Devonshire Road only, the trustees should not in any one year expend more than the sum of 400*l.* upon its support and maintenance, and that they should invest the balance of the income received by them so as to provide a fund for the alterations of the Hawthorns required to adapt it to the purposes of such hospital and the erection of additional buildings therefor in the grounds of the said messuage, which he directed his trustees to do as soon as the said premises should be free from the restrictive covenant aforesaid; and he declared that the hospital should be carried on under the direction of a committee consisting of the three trustees of his will, three persons to be nominated every year by the vestry of Streatham, and such other persons (if any) as the said trustees and representatives should co-opt, but so that the total number of the committee should not exceed nine.

The testator died on February 24, 1902, and his will was proved on April 24, 1902. The trustees established a dispensary at No. 12, Devonshire Road, and maintained it in accordance with the trusts of the will and accumulated the residue of the income until November 10, 1907, when the restrictions on the user of the Hawthorns expired. The funds then available for the charity amounted to 100,000*l.*, producing an income of 3000*l.* a year. These funds had been transferred to the Official Trustee of Charitable Funds.

Two of the three trustees of the testator's will were doubtful whether the Hawthorns could be made suitable for the establishment of a cottage hospital or convalescent home which would require the expenditure of so large a fund. They obtained a report, on the instructions of the Commissioners, from Mr. Penfold, an architect, who stated "that the position and aspect of the Hawthorns made it quite unsuitable for a convalescent home, and that the site was too small for the erection on it of a cottage hospital which would require so large an income, but that if

the adjoining site could be purchased it would be an appropriate position for the erection of a cottage hospital." There followed a long correspondence with the Charity Commissioners, who took the view that a cottage hospital was not desirable in the proposed position, in which view they were supported by Sir Henry Burdett, representing King Edward's Hospital Fund.

On July 8, 1907, the trustees, on the suggestion of the Commissioners, made a formal application for a scheme.

At this time a fund was being raised for enlarging a general hospital situate in the borough of Battersea, which does not include any part of the parish of Streatham, about half a mile from the nearest point of the Streatham boundary, and the majority of the trustees and the Commissioners considered that it would be more beneficial for the neighbourhood that the funds left by the testator should be applied in enlarging, equipping, and maintaining the Bolingbroke Hospital than in founding a cottage hospital, and in July, 1907, the trustees entered into an agreement with the trustees of the Bolingbroke Hospital, subject to the approval of the Charity Commissioners, to contribute 50,000*l.* out of the trust funds to the building and equipping of additional wards to the hospital, which it was agreed should be called the Weir and Bolingbroke Hospital, and contributing a large part of the income of the residue of the trust funds towards the maintenance of this hospital. The agreement was made subject to the approval of the Charity Commissioners and to the preparation by the Commissioners of schemes for the Weir trust and the Weir and Bolingbroke Hospital, approved by the parties thereto, provided that in any event the sum of 5000*l.* should be paid to the hospital immediately if the consent of the Charity Commissioners to such payment should be obtained. This immediate payment was intended to enable the Bolingbroke trustees to obtain payment of two sums of 5000*l.* which had been promised conditionally on a third sum being subscribed by a fixed date. The agreement was signed by a majority of the trustees of the will.

The Charity Commissioners in accordance with this agreement on August 12, 1907, raised out of the trust funds and paid over to the trustees of the Bolingbroke Hospital 5000*l.*

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The contemplated scheme was vehemently opposed by many inhabitants of Streatham and by the Wandsworth Borough Council, who had succeeded to the powers of the Streatham vestry, but after much correspondence and a public inquiry the Charity Commissioners on December 8, 1908, made an order establishing a scheme, of which the main provisions were that the Weir charity and its endowments should be administered together with the charity called the Bolingbroke Hospital; that the dispensary established at 12, Devonshire Road should be continued under the management of local trustees to be appointed practically as directed by the will, to whom 400*l.* a year should be paid out of the income of the charity for the purpose; and that the Hawthorns should be used as a nurses' home to be called the Weir Nurses' Home in connection with the Weir and Bolingbroke Hospital, to be administered and managed by a home committee of seven persons, four of whom were to be appointed by the governing body and three by the local trustees. It was intended that the home should accommodate twenty nurses, four of whom were to give their services gratuitously in the district. A sum of 350*l.* a year with possible additions was to be paid to the local trustees to be applied in giving certain forms of medical relief to deserving inhabitants of Streatham. A sum of 50,000*l.* out of the capital of the trust funds (including the 5000*l.* already paid) was to be expended in building and equipping the proposed additions to the Bolingbroke Hospital, which was to be called for the future the Weir and Bolingbroke Hospital.

This scheme was only to come into operation after the establishment of a scheme for the Bolingbroke Hospital which provided that the three trustees of the will and the three trustees appointed by the Wandsworth Borough Council should be members of the governing body, which was to consist of not more than eighteen persons, and not less than thirty beds in the free wards and not less than eight beds in the paying wards should be reserved for occupation so that there should be a preference for inhabitants of Streatham and the neighbourhood.

The Wandsworth Borough Council presented this petition,

asking that the order of the Charity Commissioners establishing the scheme might be discharged or remitted to them for reconsideration. C. A. 1910 WEIR HOSPITAL, *In re.*

The petition came on for hearing before Eve J. on March 10, 1910.

P. O. Lawrence, K.C., and *C. E. Shebbeare*, for the petitioners.

Jessel, K.C., and *Sheldon*, for the majority of the trustees.

Austen-Cartmell (*Sir W. S. Robson, A.-G.*, with him), for the Crown.

March 17. EVE J. held that the nurses' home proposed to be established at the Hawthorns was a medical charity within the meaning of the testator's will, and that on the question whether a case had arisen for the application of the cyprès doctrine, as well as on any question as to the details of the scheme, it was not the practice of the Court to review the findings of the Charity Commissioners. He therefore made no order on the petition except that the costs of the petitioners and respondents should be paid out of the current income of the charity.

The petitioners appealed. The appeal was heard on May 24 and 25, 1910. C. A.

P. O. Lawrence, K.C., and *C. E. Shebbeare*, for the appellants. The Charity Commissioners had no jurisdiction in this case to administer this charity cyprès. The doctrine of cyprès is only applicable where the original scheme of the testator cannot be carried out. Eve J. considered that the Commissioners were the authority to decide whether a case for the application of the doctrine had arisen. But *In re Campden Charities* (1) is an authority that the Court will interfere if the Commissioners have gone wholly wrong, though it is not the practice to alter the details of a scheme which the Commissioners have duly considered. So long as the testator's wishes can be carried out there is no jurisdiction to establish a cyprès scheme: *Chamberlayne* v. *Brockett*. (2) There is really no evidence that a cottage hospital cannot be established on the site of the Hawthorns on a sufficient

(1) 18 Ch. D. 310. (2) (1872) L. R. 8 Ch. 206.

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scale to usefully employ the income of the funds left by the testator; and if necessary adjoining land can be acquired. The Commissioners and their advisers have diverted the funds to a different purpose on the ground that a larger hospital at a greater distance will be more useful than a cottage hospital where the testator directed it should be. But they cannot act on such grounds. The testator is the judge whether his gift is likely to be useful: *Attorney-General* v. *Earl of Mansfield*. (1)

Even in matters of detail the Court has jurisdiction to alter a scheme, and in this case there was no proper consideration. The Commissioners had committed themselves by most improperly paying the 5000*l.* before they held any inquiry.

Jessel, *K.C.*, and *Sheldon*, for the majority of the trustees. The scheme is within the trusts of the will, for the nursing home proposed is a medical charity. The trustees had a right to select any medical charity. Of those mentioned as examples by the testator the dispensary is amply provided at 12, Devonshire Road. The evidence is conclusive that the aspect and position of the Hawthorns is quite unsuitable for a convalescent home, and we have evidence that it would be impossible to erect upon the site any hospital large enough to need the whole income. Under these circumstances it is within the discretion of the trustees and the jurisdiction of the Charity Commissioners under s. 15 of the Charitable Trusts Act, 1860 (23 & 24 Vict. c. 136), to establish a medical charity, to keep the testator's memory alive, on the spot, and spend the rest of the income in benefiting the persons he wished to benefit in the medical way which all the evidence shews is most suitable for the needs of the neighbourhood.

Austen-Cartmell (*Sir W. S. Robson*, *A.-G.*, with him). We do not appear as counsel for the Charity Commissioners, but as Attorney-General to assist the Court on the part of the public. The Attorney-General thinks the scheme should be supported because on the construction of the will the trustees had a discretion as to what medical charity should be established on the site; they had exercised it by establishing a nursing home, and therefore the doctrine of cyprès became applicable to the surplus. The payment of the 5000*l.* was anticipatory; the

(1) (1826) 2 Russ. 501, 520.

general application for a scheme was thought to give the Commissioners seisin of the matter. The payment ought not to have been made, but it tied the hands of the Commissioners only to the extent that any scheme they approved must include that payment. The foundation of a nurses' home is a medical charity. It is not for the benefit of the nurses, but for the purpose of establishing a body of nurses for the care of the sick in Streatham.

Cur. adv. vult.

June 7. COZENS-HARDY M.R. This is a petition under s. 8 of the Charitable Trusts Act, 1860, against an order of the Charity Commissioners establishing a scheme for the administration of a charity. Eve J. dismissed the petition, and the petitioners have appealed to this Court.

Now the jurisdiction of the Charity Commissioners in establishing a scheme is under s. 2 of the Charitable Trusts Act, 1860, the same as that of the Court of Chancery. It is therefore necessary to consider the principles upon which the Court of Chancery proceeded in this matter. The first duty of the Court is to construe the will, and to give effect to the charitable directions of the founder, assuming them not to be open to objection on the ground of public policy. The Court does not consider whether those directions are wise or whether a more generally beneficial application of the testator's property might not be found. There are many charitable purposes which, according to modern views, are productive of more harm than good—for example, doles in money or kind. But, apart from such statutory power as is expressly conferred by s. 30 of the Endowed Schools Act, 1869, the Court must give effect to a testator's directions as to doles.

There are, however, many cases in which what is known as a cyprès application is made by the Court. In general this is limited to old charities, where by reason of lapse of time and change of circumstances the original purpose cannot be carried into effect in the exact way directed by the testator. The well-known case of a fund for the redemption of Barbary slaves is a good instance: see *Attorney-General* v. *Ironmongers' Company*. (1)

(1) (1840) 2 Beav. 313; (1841) Cr. & Ph. 208.

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In re Campden Charities (1) is a more recent instance. There may be modern charities in which the cyprès doctrine can be properly applied, although such cases rarely occur. For example, the fund may be so large as to satisfy the Court that it cannot all be applied to the original prescribed purpose. If so, the general charitable intent will prevail and the particular mode will be disregarded. Wherever the cyprès doctrine has to be applied, it is competent to the Court to consider the comparative advantages of various charitable objects and to adopt by the scheme the one which seems most beneficial. But there can be no question of cyprès until it is clearly established that the directions of the testator cannot be carried into effect.

In the present case the charity is modern. It was created by the will of Mr. Weir, who died in 1902. The charity property consists of (1.) two freehold houses, one of which is a comparatively small house in Devonshire Road, Balham, and the other, called the Hawthorns, is a large house in which the testator resided, with a considerable garden, in Streatham, and (2.) the testator's personal estate of the value of 100,000*l*. The provisions of the will, so far as material, are as follows: [His Lordship stated the will as above, and continued:—]

Now the construction of the will does not present much difficulty. The testator's desire and intention was that the Hawthorns should be adapted by means of accumulated income for the purposes of (*a*) a dispensary, (*b*) a cottage hospital, (*c*) a convalescent home, or (*d*) some other medical charity, to be associated with his name and called "the Weir Hospital," and to be supported and maintained out of the income of the 100,000*l*., after setting aside some small sums which need not be further mentioned. Of the above objects it seems to be admitted that the Devonshire Road house is ample for a dispensary, and that the Hawthorns from its position is not suitable for a convalescent home. This leaves only (*b*) and (*d*). As to (*b*) there is not a particle of evidence to shew that a cottage hospital, with an out-patient department and a resident medical officer's house, cannot advantageously be established there on such a scale as will absorb all, or substantially all, the available

(1) 18 Ch. D. 310.

income. Mr. Penfold's report negatives any such view. If it be thought expedient to enlarge the site by purchasing some adjoining property, or to spend more than the accumulated income in erecting or adapting buildings, this can be done under the powers conferred upon the Charity Commissioners by s. 21 of the Act of 1853 and s. 15 of the Act of 1860. This would not be an application of the funds cyprès. It would be merely an administrative act for the benefit of the testator's charity. With regard to (*d*) it is proved that 100,000*l.* will not suffice to provide a general hospital, such as we are all familiar with. But the testator has not expressed a desire for a general hospital. In these circumstances it seems to me that there is no justification for invoking the cyprès doctrine.

The trustees have simply to obey the explicit directions of the testator. Of the four objects named one at least is practicable. They have no right to say "We do not consider a cottage hospital a good thing at Streatham, and we will not apply the charity funds for such a purpose, but we will by our own act produce a state of facts which will render it impossible to spend the whole income on the Weir Hospital, and thus invoke the cyprès doctrine." The trustees applied to the Charity Commissioners under the Act of 1891 for leave to retain the freehold houses and for advice. The Commissioners thought it would be a more useful thing to assist an excellent general hospital, the Bolingbroke Hospital, situate in Wandsworth and not in Streatham, and some considerable distance away from the Hawthorns. The majority of the trustees, with some hesitation, adopted the suggestion, and ultimately a scheme was sealed under which the Devonshire Road house was to be continued as a dispensary, the Hawthorns was to be used as a nurses' home (as to which I will only say that I doubt whether it is a medical charity), and 50,000*l.* was to be applied out of capital towards completing the Bolingbroke Hospital, and the residue of the income of the charity was to be applied in augmentation of the income of the Bolingbroke Hospital, which was to be called the Weir and Bolingbroke Hospital. The whole scheme is contingent upon the establishment of another scheme for the Bolingbroke Hospital, and no application for such a scheme has yet been made.

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In my opinion this scheme was not authorized. If the general principle of the scheme was sound the Court would hesitate to interfere with the discretion of the Commissioners on the mere ground that some details might be open to objection. But if, as I hold, the Charity Commissioners have gone wrong by disobeying those rules of law which govern them it is the duty of the Court to interfere. *In re Campden Charities* (1) is a clear authority for this proposition. In what I have said I do not intend to cast any reflection upon the trustees, who were honestly desirous of assisting the Bolingbroke Hospital, a most excellent charity, and who were told by the Commissioners that such desire could be lawfully effected. In framing schemes even the most experienced persons are liable to mistakes in law, and it would be wrong for any one to blame them, and most of all for a judge whose mistakes in law are corrected by the House of Lords. But I cannot part with the case without expressing my astonishment that the Commissioners should have directed the payment out of the charity funds of 5000*l.* to the Bolingbroke Hospital without any scheme and without even notice of intention to make such a payment. There has been no attempt to justify this. Happily the whole fund, except the 5000*l.*, is safe, and will now be applied under a scheme so framed as to give effect to the directions contained in the testator's will. The appeal must be allowed.

FARWELL L.J. This appeal raises questions of considerable importance to the parties, but of even greater importance to the public, as affecting the jurisdiction of the Charity Commissioners and their administration of the large trust funds committed to their care.

By s. 2 of the Charitable Trusts Act, 1860, the Charity Commissioners (subject as therein mentioned) are authorized "to make such effectual orders as may now be made by any judge of the Court of Chancery . . . . for the establishment of any scheme for the administration of any such charity." Now the Court of Chancery adopted schemes as the convenient machinery in most cases of charitable trusts for carrying into execution such trusts and giving effect to the intentions of the founder

(1) 18 Ch. D. 310.

thereof. As charities are for the most part created in perpetuity, it would obviously have created a block in chambers and have put the charity funds to continual heavy costs if all charitable trusts had been retained and dealt with by Masters and chief clerks in chambers as in the case of ordinary trusts. In *Attorney-General* v. *Haberdashers' Company* (1) Lord Thurlow says: "As to the execution of the trust it is not to be kept under the direction of the Court to be executed by the Court from time to time, but is to be executed under a general direction to the trustees which is the only way of administering a charity." But the scheme is mere machinery: the function and duty of the Court is to give effect to the testator's will; nor is there any jurisdiction to apply cyprès so long as any lawful charitable object of the testator's bounty is available, however inexpedient such object may appear to the Court as compared with other objects. The law is clearly stated by Lord Romilly in *Philpott* v. *St. George's Hospital* (2), a case in which a scheme proposed to apply money left on trust to establish almshouses for the purpose of a hospital. He says: "It has, I think, of late, been sometimes considered, that whenever the Court had to direct a scheme to be framed for the establishment of a charity, it had power to deal with the property as it pleased, and in point of fact to do anything, which, within certain limits, it thought expedient to be done with the property. A more erroneous opinion, and one less in accordance with the decisions of this Court in matters of charity, can hardly be conceived. The confusion and error have arisen from this—that the Court has an unlimited power and discretion or nearly so, in some cases, in which it makes a scheme, but that in other cases it has not. The distinction consists in this:—If the testator has, by his will, pointed out clearly what he intends to be done, and his directions are not contrary to the law, this Court is bound to carry that intention into effect, and has no right and is not at liberty to speculate upon whether it would have been more expedient or beneficial for the community that a different mode of application of the funds in charity should have occurred to the mind of the testator, or that he should

(1) (1791) 1 Ves. Jun. 295. (2) (1859) 27 Beav. 107, 111.

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have directed some different scheme for carrying his charitable intentions into effect. Accordingly instances of charities of the most useless description have come before the Court, but which it has considered itself bound to carry into effect. But there are other cases where the testator has devoted funds to charity generally, and has not specified any particular charity or application of the funds. In these cases the Queen, by her sign manual, directs the charity to be carried into effect by the Attorney-General or by this Court, which then has the full power to adopt any scheme which the Attorney-General, after considering the matter fully, should deem expedient. So, also, where there are accretions to a charity, which are not specifically disposed of, the Court, in that case, may, to some extent, act in a similar way. So, also, where a fund is given for a particular object, which entirely fails, as in the case of *Lady Mico's Charity* (1), where a large property was given for the redemption of Christian slaves in Barbary, and the charity failed for want of objects. In these cases, the Court, under what is called the doctrine of cyprès, may regulate the application of the charity funds consistently with the law of the country and the view of the Attorney-General. But in this case the Court has to carry into effect a charity founded by the testator himself, and therefore it is not in a position to do what it pleases, but it must do that which is in accordance with the will of the testator." In the present case the testator has expressed his wishes in plain terms. His desire is that No. 12, Devonshire Road, and his own residence, the Hawthorns, as soon as the restrictive covenants affecting it had expired, should be devoted to use as "a dispensary cottage hospital or convalescent home or other medical charity" to be called the Weir Hospital, and that the income of his entire residuary estate, subject to certain small payments thereout, should first be applied in providing for an expenditure of a sum not exceeding 400*l.* a year on 12, Devonshire Road, and that the balance should be accumulated until the Hawthorns became capable of use as a hospital in order to provide a sum for alterations and additions, and subject thereto the whole income was to be applied in the support and maintenance of the hospital.

(1) *Attorney-General* v. *Gibson*, (1835) 2 Beav. 317, n.

The trust funds amount to about 100,000*l.*; but I observe that many of the investments are not trustee securities and that about 200*l.* a year is produced by shares or securities of brewery companies, which can hardly be regarded, under present circumstances, as a secure source of income. It is, in my opinion, clear on the evidence that a dispensary at No. 12, Devonshire Road with an endowment of 400*l.* a year as proposed by the scheme is reasonable and proper and within the terms of the will: it is also clear on Mr. Penfold's report, obtained by the instructions of the Charity Commissioners and sent to them, that the Hawthorns would be (to use his own words) "a good and appropriate position on which to erect buildings specially adapted to the requirements of the trustees" (i.e., as a cottage hospital) "if one or two of the adjoining sites in Grove Road can be acquired": one of such sites is now on offer to the trustees, and it is clearly within the power of the Charity Commissioners under s. 16 of the Act of 1860 to authorize its purchase, without any scheme for the purpose.

The Commissioners, however, have from the first taken the view put forward in the report which counsel told us was their case, and I can only say that it shews an entire misapprehension of their duties and powers. This report, after an inaccurate and incorrect reference to Mr. Penfold's report, states (p. 2) that the Commissioners, "after carefully considering the possibilities of a convalescent home and of a cottage hospital, decided that such institutions in the locality in question were not desirable forms of medical charity; that cottage hospitals are not suited to the needs of the nearer suburbs of London"; and they determined to establish a nurses' home at the Hawthorns, and, subject thereto, to hand over the whole of the estate to the Bolingbroke Hospital. It was no part of the Commissioners' duty to consider whether cottage hospitals are or are not desirable. The testator had in terms directed such a hospital to be established at the Hawthorns; the dispensary was already provided for at No. 12, Devonshire Road, and a convalescent home was not thought expedient. There remained nothing but the cottage hospital or other medical charity. They have chosen a nurses' home (as to which

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I will only say that I think it extremely doubtful whether such a home as they propose is a charity at all), which absorbs only a small sum, and they refuse to set up a cottage hospital partly on the ground that they disapprove of such hospitals and partly because they consider the income is more than sufficient for such a purpose. I am not sure which ground is the more untenable. The first is obviously bad for the reason already given. The second appears to assume that it is wrong to have a large margin on starting such a hospital. In my opinion the reverse is the case. It might be wrong to embark on a scheme which left no margin for contingencies; but the wise man would certainly apportion his expenditure so as to leave some margin, and when I consider the nature of the investments and the amount of margin in this case I see nothing extravagant in its amount. The existence of such a margin does not render the charity named by the testator impossible, but is a guarantee of its success, and I am of opinion that neither the trustees nor the Commissioners have authority to choose their charity so as to leave a surplus to be applied cyprès. They are bound to apply the funds in the named charities unless it be impracticable. It is clearly impossible for the Commissioners or trustees to decline to carry out the trusts of a single named lawful charity because they disapprove of it. It is equally clear that if they have the choice of two or more charities they cannot apply a part of the trust funds towards one of such charities and refuse to apply the balance to the others because they disapprove of them. A case for the cyprès application of trust funds cannot be manufactured, but must arise ex necessitate rei. I, of course, give the Commissioners and the trustees full credit for desiring to do their best; but it is of great importance that their conduct should be in accordance with law. It is contrary to principle that a testator's wishes should be set aside, and his bounty administered not according to his wishes but according to the view of the Commissioners, and if it is wished that testators should continue to become "pious founders" it is eminently desirable that no doubt should be cast on the security and permanency of their bequests. One of the strongest inducements to gifts of this nature is that desire for posthumous remembrance which has inspired similar gifts for centuries.

There remains the question of the 5000*l.* On August 12, 1907, while the express trust for accumulation was in force, and before any scheme for the administration of the charity had been made, 5000*l.* was paid by the Commissioners to the Bolingbroke Hospital out of the trust funds. This payment was clearly unjustifiable: if it had been made by trustees they would be personally liable to replace it; it is so hopelessly wrong that the Attorney-General's counsel could suggest no ground of justification; it was wrong on the elementary principle that it is unlawful for A.'s trustees to take A.'s money and give it to B. Such a payment could only be justified as part of a scheme if there were a case for cyprès application and if a scheme for such application had been made. No such scheme had been made. A colourable request for this payment was signed by the trustees at the request of the Commissioners on the form used for schemes, but it was not (as the Commissioners shew by their subsequent letters that they knew) a scheme. If it had been, notices had to be given and time had to elapse under the Act before it could come into force (see the Act of 1860, s. 6), and as any such scheme must affect the Bolingbroke Hospital, the trustees of that hospital must have submitted to the jurisdiction of the Commissioners and consented to the scheme, and this they never have done to this day.

There is not a shadow of excuse for this payment, and it is alarming to find that a Government office is capable of such a misapplication of funds committed to its care. I cannot find, however, that the Legislature has given the Court any jurisdiction to set this right. The Court can refuse to sanction a scheme, but no provision is made enabling the Court to enforce repayment of money mistakenly applied by the Commissioners, but I trust that the Attorney-General will consider whether this sum cannot in some way be recovered for the Weir charity.

The Legislature appears to have trusted to that control over Government departments that the House of Commons possesses and which is usually enforced by question and answer in the House. One of the Commissioners is a member of Parliament, and it is his business to answer questions relating to his department. On March 23, 1908, one of the Commissioners in the

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House was asked, inter alia, under what statutory powers this 5000*l*. was paid. This part of the question was not answered. On May 20, 1908, he was again asked the same question and simply referred to his former answer. In July, 1908, the question was repeated to another Charity Commissioner in the House, and on pressure he stated that he would write a letter referring to the sections of the statute under which the payment was made. Such a letter was afterwards sent, and none of the sections referred to therein have any bearing whatever on the point, and the Attorney-General's counsel admits that there is no such section; and there ended the inquiry in the House into the statutory powers of the Commissioners to make this payment. Comment is unnecessary. The facts speak for themselves. I agree that this appeal must be allowed. Eve J. appears to have thought that the Commissioners have a free hand and can do as they please. I cannot agree with him, and his attention does not appear to have been called to the payment of the 5000*l*.

KENNEDY L.J. In my opinion this appeal must be allowed.

Where the directions of the testator do not offend against either law or public policy, the application of the cyprès doctrine to the employment of his charitable bequest is permissible only where the administration of the trust fund in accordance with the testamentary directions of the donor either is, or, as is the commoner case for the application of the doctrine, has through a supervening change of circumstances in course of time become, practically impossible. I think that there is authority for admitting into the category of such practical impossibilities the case of a fund which is from the first, or has become, grossly in excess of any amount which could, without unreason, be expended in loyally fulfilling the express terms of the benefaction.

But neither the Court of Chancery, nor the Board of Charity Commissioners, which has been entrusted by statute, in regard to the application of charitable funds, with similar jurisdiction, is entitled to substitute a different scheme for the scheme which the donor has prescribed in the instrument which creates the charity, merely because a coldly wise intelligence, impervious to

the special predilections which inspired his liberality, and untrammelled by his directions, would have dictated a different use of his money. The cyprès doctrine can properly be applied only where (to borrow language from Sir George Jessel M.R. in *In re Campden Charities* (1)) it is or has become impossible beneficially to apply the property left by the founder or donor in the exact way in which he has dictated it to be applied, and it can only be applied beneficially to similar purposes by different means. If the charity can be administered according to the directions of founder or testator, the law requires that it should be so administered. If, on the other hand, it is from the first, or it becomes in course of time, clear that the funds cannot beneficially be used in that way, and the doctrine of cyprès is, therefore, properly and necessarily applicable, this Court will not be induced to interfere, on points of detail, with a scheme sanctioned by the Board of Charity Commissioners. It must be convinced that, in the words of Sir George Jessel M.R., there has been some slip or gross miscarriage which calls for the intervention of the court to set aside and remodel the scheme.

The principles and the practice which I have sought to summarize appear, I think, distinctly in the pronouncements of Lord Eldon in *Attorney-General* v. *Earl of Mansfield* (2) and *Attorney-General* v. *Whiteley* (3), of Lord Romilly in *Attorney-General* v. *Governors of Sherborne Grammar School* (4), and *Philpott* v. *St. George's Hospital* (5), and the judgments of Sir George Jessel M.R. and James L.J. in *In re Campden Charities.* (6)

It follows that in the present case there are two dominant questions to be considered, namely, (1.) Can the testamentary directions of Mr. Weir in regard to his charitable bequest be followed in a scheme of administration? (2.) If so, is the scheme sanctioned by the order sealed by the Board of Charity Commissioners on December 8, 1908, such an administrative scheme?

I shall not recapitulate here the provisions of Mr. Weir's will verbatim. In substance the material parts are these. [His

(1) 18 Ch. D. 323.
(2) 2 Russ. 501, 520.
(3) (1805) 11 Ves. 241, 251.
(4) (1854) 18 Beav. 256, 280.
(5) 27 Beav. 107, 111, 112.
(6) 18 Ch. D. 310.

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Lordship then stated the provisions of the will and the facts of the case as above, and proceeded.]

The plan of the charity to be established as the donor clearly willed it, in its essential characteristics, is, therefore, as it appears to me, unquestionably this: The establishment, temporarily at 12, Devonshire Road, and after the expiration of the restrictive covenant affecting the testator's home the Hawthorns, at the Hawthorns, either with or without the continued use of 12, Devonshire Road as an adjunct, of a hospital, for the benefit of the parish of Streatham and the neighbourhood, and to be governed by his three trustees under his will and with an equal number appointed by the vestry of Streatham with a limited power of co-opting; the term "hospital" being expressly limited to (1.) a dispensary; (2.) a cottage hospital; (3.) a convalescent home; (4.) any other medical charity. The site of the testator's home in life, to be altered or enlarged, if necessary, was to be the site of the hospital: the hospital was to bear his name as its name; in it were to be treasured and preserved, as visible memorials of the founder, certain personal chattels for which he evidently had a special affection. Until such time as the Hawthorns could be adapted and used for the hospital, the income of the trust funds, except so much, not exceeding 400*l.* in any one year, as would be required for the maintenance of the hospital in its temporary home at 12, Devonshire Road, was to be allowed to accumulate for the purpose of providing a fund for such alteration and enlargement of the Hawthorns as might be necessary to adapt it to the purposes of the hospital. Upon its face the beneficent scheme of Mr. Weir's charity, as explicitly set forth in his will, appears to be simple and practicable enough.

Let us now consider what, as a matter of history, the Board of Charity Commissioners has done. In the metropolitan borough of Battersea, which does not include any part of the ancient parish of Streatham, that parish being now comprised in the Balham and Streatham wards of the metropolitan borough of Wandsworth, is an excellent general hospital, founded in 1880, and well known as "the Bolingbroke Hospital." It appears from the evidence to be about half a mile from the nearest part, and nearly four miles from the furthest part of Streatham, and about one and a quarter

miles from the Hawthorns. In 1907 the Bolingbroke Hospital was being altered and enlarged, and a large sum was required by its managers for this purpose. On August 12, 1907, on the application of the majority of the Weir Hospital trustees, but without any general scheme for the administration of the Weir Hospital charity having been drawn up, the secretary of the trustees on the preceding July 30 having informed the secretary of the Charity Commissioners of the intention of the Weir Hospital trustees to apply for such a general scheme, the Board of Charity Commissioners ordered the payment to the Bolingbroke Hospital out of the Weir Hospital funds of the sum of 5000*l.*, and it was paid accordingly. On December 8, 1908, the Board of Charity Commissioners sealed an order for the establishment of a scheme. It is to set aside or vary that order that the present appellants presented the petition, from the dismissal of which by Eve J. the present appeal to this Court has been brought. The main features of this scheme, to which alone I need, for the purposes of this judgment, refer, are these: (1.) The Weir Hospital charity and its endowments are to be administered together with the charity now called the Bolingbroke Hospital Incorporated. (2.) The Bolingbroke Hospital is to take the name of the Weir and Bolingbroke Hospital. (3.) Provision is made for admitting to a share in the administration and management of the charity both the trustees for the time being under Mr. Weir's will, and also, under the style of representative trustees and co-optative trustees, persons resident in the parish of Streatham. There are also provisions for providing some special medical and nursing assistance to sick persons in the parish of Streatham and the neighbourhood. (4.) Besides the sum of 5000*l.* already mentioned, 45,000*l.* more out of the funds of the Weir Hospital charity are to be expended in defraying the cost of completing and equipping the enlargements of the Weir and Bolingbroke Hospital. (5.) The dispensary at 12, Devonshire Road is to be continued and a yearly sum of 400*l.* is to be paid for the maintenance and support of the dispensary. (6.) The Hawthorns is to be used as a nurses' home, to be called the Weir Nurses' Home, in connection with the Weir and Bolingbroke Hospital, and subject to the direction of the committee of that hospital. Out of the number of these

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nurses (I think twenty) only a small fraction (I think four) will be employed in gratuitous service. It appears to me to be impossible, in this state of facts, to treat the action of the Board of Charity Commissioners as administration of the charitable bequest of the testator in accordance with the direction of his will. The learned counsel for the Attorney-General was obliged to admit that the transfer in 1907 of the sum of 5000*l.* to the Bolingbroke Hospital was indefensible. Whether this serious error is irreparable or not I do not know. It was committed, no doubt, with the best intentions; but after reading the affidavit of Sir Henry Kimber as to questions and answers in Parliament, and the letter of July 24, 1908, written by the parliamentary representative of the Board, one cannot but feel surprise and regret that the Charity Commissioners did not give a closer and more careful consideration to the propriety of such a course, before making the order of August 12, 1907.

This transfer, however, forms after all but a part of the deviation from the directions contained in Mr. Weir's will. According to those directions the capital fund of 100,000*l.* was to be kept and used as the source of the income which would defray the maintenance expenses of the Weir Hospital to be established on the site of the Hawthorns, and also, of the establishment, at 12, Devonshire Road, if it was retained, as an adjunct. The alteration of the Hawthorns, in order to adapt it to its use as the hospital, as well as its enlargement, if deemed proper for the same purpose, was to be paid for out of the accumulations of income arising during the years of the period during which only 12, Devonshire Road was available for use as the hospital. According to the scheme now in question no less than 50,000*l.*, one half of the capital of the Weir Hospital fund, is to be expended in enlarging the Bolingbroke Hospital, and equipping its new wards. I doubt whether the nurses' home which it is proposed to establish at the Hawthorns, constituted and used as it will be, in connection with the Weir and Bolingbroke Hospital for the accommodation of nurses, of whom only a few are to supply gratuitous nursing to sick folk in the district, could be rightly treated as falling within the description "medical charity" within the meaning of the will. But be that

as it may, the result of the scheme will be that the funds supplied by Mr. Weir's charity will be used, not to create and support for the benefit of the inhabitants of the parish of Streatham and the neighbourhood a separate Weir Hospital at the Hawthorns, but as to one half of the total sum to enlarge, and as to the residue of it, to support an existing general hospital outside the parish of Streatham and between one and two miles distant from the testator's chosen site, with the nurses' home at the Hawthorns as an adjunct, and, to the extent of 400*l.* yearly, the dispensary at 12, Devonshire Road.

Clearly this is not a scheme for the administration of the Weir Hospital charity, and, therefore, it can only be regarded as legitimate if the cyprès doctrine is properly applicable to the administration of the charity. One has to inquire whether there is such proved impossibility to administer this charity in accordance with the directions of Mr. Weir's will as will render the application of the cyprès doctrine legally justifiable.

I share the inability of the Master of the Rolls and Farwell L.J. to find any such ground of justification. The evidence is clear that, whilst there are reasonable objections to the site of the Hawthorns as a site for a convalescent home, it is a good site for the establishment of a cottage hospital. The trustees consulted Mr. Penfold at the suggestion of the Board of Charity Commissioners, and his report in substance was that the Hawthorns would be a good and appropriate position in which to erect buildings especially adapted for a cottage hospital, provided that the area were extended; that is to say, if one or two of the adjoining sites in Grove Road could be acquired. It is in evidence that one such adjoining site can be bought by the trustees. The Board of Charity Commissioners have statutory power to authorize its purchase.

It appears to me that it is not open to the Board of Charity Commissioners, because (whether rightly or wrongly) they think that, as I understand from his affidavit to be the view of Sir Henry Burdett, the creation of a cottage hospital on a Streatham site is, on general grounds, less desirable than the enlargement of a general hospital in the position of the Bolingbroke Hospital outside the district, to set aside the clear direction of the testator,

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who has in founding his charity expressly included a cottage hospital as one of the alternative forms of medical charity which his trustees may adopt for the establishment of the Weir Hospital. The fact that, according to competent opinion, the charitable fund might have been more usefully applied in a different way is not a lawful ground for disregarding the express terms of the gift. Still less, in my judgment, is it open to the Board of Charity Commissioners while not establishing a cottage hospital at the Hawthorns, to choose to place there an institution in the form of a nurses' home, which, with the dispensary maintained (quite properly) at 12, Devonshire Road will need so little financial support from the charitable funds in the hands of the Weir Hospital trustees that a large surplus will result, and then to say that the existence of the surplus thus created entitles them to apply the cyprès doctrine and under it to subsidize the Bolingbroke Hospital. I should be greatly surprised if any one asserted that, if a cottage hospital was established on the Hawthorns site, enlarged as it can be, according to Mr. Penfold's suggestion, and equipped as it might be, with resident medical officers and accommodation for out-patients, the yearly income of 3000*l.*, after providing for its wants and the wants of the dispensary at 12, Devonshire Road, would leave more than a reasonable margin for the contingent expenditure for which those who have to maintain such establishments are always bound to make provision.

In my judgment the petitioners have made out their case, and the judgment of Eve J. should be reversed.

After some discussion the form of order made was that the order of the Charity Commissioners should be discharged and the whole question remitted to the Board for reconsideration.

Solicitors: *Walter W. Young; Bayley, Adams, Hawker & Noble; The Treasury Solicitor.*

J. R. B.

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[1909 E. 562.]

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Power of Appointment—Special Testamentary Power—Release—Restriction on Exercise in Favour of Particular Object—Inconsistent Appointment.

The donee of a testamentary power of appointment among children and issue may covenant that he will not exercise the power in such a way as to reduce the share of a particular object below a certain amount, and thereafter the power can only be exercised subject to the limitation or fetter imposed by the negative covenant. The donee may satisfy the covenant either by appointing by will to the covenantee the named sum or by so appointing to other objects as that there shall remain unappointed such a sum as shall result in the covenantee receiving the named sum, but the covenant cannot operate affirmatively as an appointment, since that would be to allow a power exercisable by will only to be exercised by deed.

Davies v. *Huguenin*, (1863) 1 H. & M. 730, overruled on this point.

A lady had under her marriage settlement a testamentary power of appointment over a fund among her children and issue, and in default of appointment the fund was to be divided after the death of the survivor of the husband and wife among her children equally. In exercise of her power of appointment she appointed by her will a sum of 60,000*l.* to be divided between her six sons and settled upon them and their children and the residue to be divided into sevenths and settled upon her six sons and her daughter and their children. Subsequently she covenanted with three of her sons not to exercise her testamentary power of appointment in such a way as to reduce their respective shares in the fund below 7000*l.* apiece:—

Held, that the fetter imposed by these covenants involved the consequence that each of her seven children should receive 7000*l.* absolutely as in default of appointment, and that the appointment operated only over the balance of the fund after deducting 49,000*l.*

Appeal from a decision of Neville J.

By a settlement dated December 14, 1857, made on the marriage of Isabella Marie Evered with Everard Robert Fountain Evered certain real estate was settled upon trust for sale and to hold the proceeds upon trust for Mrs. Evered for life for her separate use without power of anticipation while under coverture, and after her decease upon trust for her husband for life or until he should marry again, and after the

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decease of the survivor upon trust to assign the said trust moneys unto or in trust for such of the children or remoter issue of Mrs. Evered (such issue to be born in the lifetime of Mr. and Mrs. Evered or the survivor of them) in such manner and form and if more than one in such parts, shares, and proportions and with such limitations over or substitutions in favour of any one or more of such children and other issue respectively and to vest and be payable at such times as she should by her last will or any codicil thereto appoint, and for want of such appointment and so far as the same should not extend upon trust to assign the said trust moneys unto all the children of Mrs. Evered who being a son or sons should attain twenty-one or being a daughter or daughters should attain that age or be married under that age in equal shares, and the settlement contained a hotchpot clause.

Mrs. Evered survived her husband and died on April 22, 1909, without having been married again. There was issue of the said marriage six sons and one daughter, namely, (1.) Everard Fazakerley Evered, (2.) Henry Gillibrand Evered, (3.) John Elwin Evered, (4.) Alfred Hastings Evered, (5.) Gillibrand Elwin Evered, (6.) Robert Kendrick Evered, and (7.) Mary Frances Hussey Walsh. All the children had attained twenty-one and were now living, and they all had issue living.

By her will, dated January 13, 1892, Mrs. Evered in exercise of the testamentary power of appointment given to her by her marriage settlement directed the trustees of the settlement to raise out of the trust property the sum of 60,000*l.* and to divide the residue of the said property into seven equal parts and to divide the said 60,000*l.* and the said residue into seven trust funds, whereof six (thereinafter referred to as her sons' trust funds) should consist each of the sum of 10,000*l.* (being one-sixth of the said 60,000*l.*) with one equal seventh part of the residue, and the remaining one (thereinafter referred to as her daughter's trust fund) should consist only of the remaining seventh part of the said residue; and she directed her trustees to pay the income of each son's trust fund to him for life and after his death in trust for all his children born in the testatrix's lifetime who being sons or a son should attain twenty-one or

being daughters or a daughter should attain that age or marry under that age in equal shares, subject, however, to a forfeiture clause and to certain protective trusts in the event of any son becoming bankrupt or alienating; and she directed the daughter's share to be held upon trust to pay her the income for life for her separate use without power of anticipation and after her death in trust for all her children born in the testatrix's lifetime who being sons or a son should attain twenty-one or being daughters or a daughter should attain that age or marry under that age.

By a codicil to her will, dated September 4, 1897, the testatrix in exercise of the power of appointment conferred by her marriage settlement appointed a manor farm which had become part of the settled property in trust for her son Robert Kendrick Evered absolutely.

The testatrix also made two other codicils to her will, dated May 31, 1898, and January 27, 1905, not material to the present purpose.

The will and codicils were duly proved on June 15, 1909.

After the date of the execution of the will Mrs. Evered executed four deeds which were respectively expressed to be supplemental to her marriage settlement.

By the first deed, dated July 9, 1901, and made between Mrs. Evered of the first part and Alfred H. Evered of the second part, Everard F. Evered of the third part, and Gillibrand E. Evered of the fourth part, after reciting that for the purpose of making a certain provision for each of her children Alfred H. Evered and Everard F. Evered to the extent of 7000*l.* apiece out of the trust funds comprised in the settlement Mrs. Evered had agreed to enter into the covenants thereinafter contained, and further for the purpose of benefiting her son Gillibrand E. Evered had agreed to make such assignment and release of her life interest in the sum of 1000*l.*, part of the said trust funds, for the purpose of supplementing her said covenants as thereinafter appeared, Mrs. Evered covenanted and agreed with each of them the said Alfred H. Evered and Everard F. Evered and their respective executors, administrators, and assigns that she would not exercise the power of testamentary

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appointment given to her by the said settlement so as by any means to reduce the share or interest of either of them the said Alfred H. Evered and Everard F. Evered in the trust funds then or thereafter subject to the trusts of the said settlement to a less amount in value than 7000*l.* for each of the said covenantees nor so as to postpone the vesting in possession of a share in the trust funds equal in amount or value to at least the sum of 7000*l.* in each of the covenantees beyond the death of Mrs. Evered, and she also released, assigned, and surrendered unto the said Gillibrand E. Evered her life interest in a portion or share of the said trust funds of the amount or value of 1000*l.* to the intent that the said Gillibrand E. Evered might become absolutely entitled in possession to such 1000*l.* and that the same might be immediately raised by the trustees and transferred to him. And the deed contained a proviso that nothing therein contained should operate to limit or abridge the testamentary powers of appointment by the settlement conferred upon Mrs. Evered except to the extent of the said sum of 1000*l.* thereinbefore directed to be raised, and that notwithstanding that deed or anything therein contained it should be lawful for her to exercise her said testamentary powers of appointment except as aforesaid.

By the second deed, dated August 23, 1901, made between Mrs. Evered of the one part and Alfred H. Evered of the other part, Mrs. Evered declared that the share of Alfred H. Evered in the said trust funds should be at least of the value of 7000*l.*, which sum or amount so far as she lawfully could or might she did thereby appoint and assign to him, his executors, administrators, and assigns, and she thereby released, assigned, and surrendered unto the said Alfred H. Evered her life interest in the sum of 1000*l.* to the intent that the said Alfred H. Evered might be and become absolutely entitled in possession to the said sum of 1000*l.* and that the same might be immediately raised and paid.

On March 11, 1902, an order was made by Byrne J. on an originating summons declaring that upon the true construction of the settlement and the two supplemental deeds of July 9, 1901, and August 23, 1901, Alfred Hastings Evered was absolutely

entitled to the sum of 1000*l.*, part of the said trust funds, and the trustees were ordered to raise and pay the same, and it had been raised and paid accordingly.

By the third deed, dated June 4, 1902, and made between Mrs. Evered of the one part and Gillibrand E. Evered of the other part, after reciting (inter alia) the two prior deeds and the order for the raising and payment of the 1000*l.* mentioned in the second deed to Alfred H. Evered, and that Mrs. Evered, being desirous that the said Gillibrand E. Evered should forthwith receive the sum of 1000*l.* which was intended to be vested in him by the first deed of appointment, had determined to execute the deed now in statement: Mrs. Evered, in exercise of the power conferred upon her by the Conveyancing and Law of Property Act, 1881, s. 52, and of every other power her thereunto enabling, so far released her said testamentary power of appointment over the trust funds and so far contracted not to exercise the said power as to declare that in any event the share of the said Gillibrand E. Evered in the said trust funds should be at least of the value of 7000*l.*, and covenanted with the said Gillibrand E. Evered that she would not exercise her said power so as to reduce his share of the trust funds to a less sum than 7000*l.*, and she confirmed the release, assignment, and surrender of her life interest in a portion or share of the said trust funds of the amount or value of 1000*l.* already made or purported to be made in favour of the said Gillibrand E. Evered by the first deed of appointment, and it was thereby declared that under the combined effect of the first deed of appointment and the deed now in statement the said Gillibrand E. Evered was entitled in possession to the sum of 1000*l.* and that the same should be forthwith raised and paid to him.

By the fourth deed, dated October 29, 1902, and made between Mrs. Evered of the one part and her son Everard F. Evered of the other part, after reciting (inter alia) that Mrs. Evered, being desirous that the said Everard F. Evered should forthwith receive the sum of 1000*l.*, part of the said sum of 7000*l.* appointed to him by the first deed of appointment, had determined to execute the deed now in statement, Mrs. Evered, in exercise of the power conferred on her by the Conveyancing and Law of

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Property Act, 1881, s. 52, and of every other power her thereunto enabling, so far released her said testamentary and other powers of appointment over the trust funds and so far contracted not to exercise the said powers as to declare that in any event the share of the said Everard F. Evered in the said trust funds should be at least of the value of 7000*l.* and that the vesting thereof in possession should not be postponed beyond the period of her own death, and, in confirmation of her covenant contained in the first deed of appointment, she covenanted with the said Everard F. Evered that she would not exercise her said power of appointment so as to reduce his share of the said trust funds to a less sum than 7000*l.* nor so as to postpone the vesting in possession of a share in the said trust funds equal in amount and value to at least 7000*l.* in the said covenantee beyond the period of her own death, and she also released, assigned, and surrendered unto the said Everard F. Evered her life interest in a portion or share of the said trust funds of the amount or value of 1000*l.*, and it was thereby declared that under the combined effect of the said first deed of appointment and of the deed now in statement the said Everard F. Evered was entitled in possession to the sum of 1000*l.* and that the same should be forthwith raised and paid to him.

This 1000*l.* had been raised and paid to Everard F. Evered.

At the date of the death of the testatrix the funds in the hands of the trustees of the settlement of December 14, 1857, amounted approximately to 54,000*l.*

An originating summons was taken out by the trustees of the settlement, in effect, to determine how far the four supplemental deeds above mentioned operated as releases of the testamentary power of appointment conferred on Mrs. Evered by the settlement and upon what trusts the plaintiffs ought to hold the settlement funds under the joint effect of the settlement, the supplemental deeds, and the will and codicils of Mrs. Evered, and for what persons and in what shares and proportions.

The defendants were the seven children of Mrs. Evered and their children and the incumbrancers of the shares of Everard and Alfred.

Neville J. held, upon the authority of *Davies* v. *Huguenin* (1), that the releases contained in the supplemental deeds operated to the extent necessary to provide that each of three defendants, Everard, Alfred, and Gillibrand E. Evered should on the death of Mrs. Evered take the sum of 7000*l.* in possession, subject in the case of Everard and Alfred to the 1000*l.* already advanced, and that except to the extent above stated the trust funds ought to be held upon the trusts appointed and declared by the will.

The defendant John Elwin Evered appealed from this decision and asked for a declaration that by virtue of the four supplemental deeds the testamentary power given by the settlement to Mrs. Evered was released to the extent that each of her seven children took on her death as in default of appointment a sum of 7000*l.* out of the funds subject to the settlement and that the residue only of the said funds passed under the will of Mrs. Evered.

There was also a cross-notice issued on behalf of the respondents the children of Everard, Henry, Alfred, and Gillibrand stating that the said respondents intended to contend that it ought to be declared that none of the supplemental deeds operated as a release of the testamentary power conferred on Mrs. Evered and that the appointment in the will took effect over the whole of the trust funds subject to the settlement except such part thereof as was appointed by the first codicil to the defendant Robert Kendrick Evered.

Rolt, for the appellant. The four deeds are effective as releases of the power pro tanto and the fund goes as in default of appointment. A special power to appoint by will can be released by deed in whole or in part, but the release cannot take effect in favour of some only of the persons entitled in default of appointment. Any part of the fund released must go as in default of appointment, and subject to hotchpot it must go to all those entitled in default of appointment.

The effect of the four deeds was to release the power of appointment over so much of the fund as would provide 7000*l.* for each of the seven children. It is impossible to give effect to the deeds except by allowing 49,000*l.* to go as in default of appointment.

(1) 1 H. & M. 730.

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Davies v. *Huguenin* (1) shews that these deeds operated as a release of the power pro tanto, but Neville J. has treated that decision as an authority for the proposition that there can be a release over the whole or part of the fund so as to operate in favour of one only of the persons entitled in default of appointment. That cannot have been the meaning of the decision and the point was not argued. The cases cited in argument do not support that view and are merely instances of what is known as an equitable release of a power: *Green* v. *Green* (2); *Horner* v. *Swann* (3); *Hurst* v. *Hurst.* (4) Assuming that the decision has the meaning attributed to it by Neville J. it must have been an oversight and it is wrong and ought to be overruled, and if and so far as it has that meaning it has been adversely commented upon by Kindersley V.-C. in *Coffin* v. *Cooper* (5) and by Brett L.J. in *Palmer* v. *Locke.* (6) The question was, however, not necessary to the decision of those two last cases, which decided merely that an appointment by will in pursuance of a covenant to exercise a special testamentary power in a particular way was not invalid. Neville J.'s decision cannot stand because the effect of it is to turn a power of appointment by will into a power to appoint by deed. The intention here was to release the power to whatever extent was necessary to give the favoured sons 7000*l.* each, and in the events which have happened the only way to give effect to that intention is to hold that each of the children takes 7000*l.* as in default of appointment.

Buckmaster, *K.C.*, and *E. P. Hewitt*, for the respondents the five brothers of the appellant and the mortgagee of Alfred's share. Neville J. has held that each of the three sons gets 10,000*l.* plus one-seventh of the residue, but that of that 7000*l.* is his own property and the rest is settled. That is in accordance with *Davies* v. *Huguenin* (1) and is quite right. This depends upon two propositions—first, that the donee of a testamentary power of appointment among a special class can by deed release it in whole or in part, and, secondly, that such donee may release certain of the rights which he has as regards the exercise of the power.

(1) 1 H. & M. 730.
(2) (1845) 2 J. & Lat. 529.
(3) (1823) T. & R. 430.
(4) (1852) 16 Beav. 372.
(5) (1865) 2 Dr. & Sm. 365, 375.
(6) (1880) 15 Ch. D. 294, 302.

Thus if he has a power to appoint among children and grandchildren he may release it as regards the grandchildren or he may release it in such a way as that after the release the fund subject to the power can only be dealt with in a restricted manner. In other words, the donee may fetter his exercise of the power.

[COZENS-HARDY M.R. referred to Sugden on Powers, 8th ed., p. 83.]

The effect of such a fetter is that the appointment is not bad altogether, but only to the extent to which the covenantee is defeated. If it be said that the effect of the covenant is that a power to appoint by will is in effect exercised by deed the answer is that *Davies* v. *Huguenin* (1) has so decided. In *Coffin* v. *Cooper* (2) Kindersley V.-C. recognizes *Davies* v. *Huguenin* (1) as a binding authority and regards it as the legitimate outcome of the decisions that a donee of a power to appoint by will among children may bind himself not to exercise the power at all or may covenant that one of the children should not have less than a certain share.

[BUCKLEY L.J. Kindersley V.-C. says that these decisions are violations of general principles but that he was bound to follow them. Are we?]

Yes. *Davies* v. *Huguenin* (1) has reposed undisturbed for too long a time to make it possible to review it now. The authorities shew that a power may be so fettered that thereafter its exercise can only be permitted in such a way as is consistent with the fetter imposed by the covenant. It follows that the added limitations by way of settlement as regards the 7000*l.* are bad because the testatrix has precluded herself by these four deeds from so exercising the power.

[*Levett, K.C.*, referred to Sugden on Powers, 8th ed., p. 693.]

Assuming that Neville J.'s decision is wrong, then the appellant's contention must be right. The Conveyancing Act, 1881, s. 52, expressly gives a power to release, and by two of the deeds the testatrix has exercised that statutory right.

Levett, K.C., and *H. S. Preston*, for the respondents the children of Everard, Henry, Alfred, and Gillibrand. The will stands and

(1) 1 H. & M. 730. (2) 2 Dr. & Sm. 365.

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the supplemental deeds have no effect at all upon the appointed property. They cannot operate as they stand because they are in effect attempts to exercise by deed a power of appointment by will, and that is contrary to the intention of the settlor: *Thacker* v. *Key* (1); *In re Parkin.* (2) *Davies* v. *Huguenin* (3) is wrong; it has been adversely criticized in Vaizey on Settlements, vol. ii. pp. 1497-8.

[COZENS-HARDY M.R. That was before *In re Little* (4) and *In re Radcliffe.* (5)]

If the deeds cannot operate as they stand they cannot operate at all. They were intended as partial releases in favour of the three sons, and effect cannot be given to them consistently with the intention of the appointor by holding that 49,000*l.* is to go as in default of appointment. *Davies* v. *Huguenin* (3) is not an authority for the appellant's contention.

Bovill, for the mortgagee of Alfred's share.

K. G. Metcalfe watched the appeal on behalf of the plaintiffs and Mrs. Hussey Walsh and her children, who took no active part in the appeal.

Rolt in reply.

Cur. adv. vult.

April 29. COZENS-HARDY M.R. This appeal raises questions of difficulty as to the legal position of a tenant for life of a settled fund with power to appoint by will only in favour of her children and issue, and the difficulty is increased by reason of the strange form in which some of the documents are drawn. I think it will be convenient to state shortly some of the propositions which are either elementary and beyond dispute or which have been so settled by authority as to bind us. In the first place, a power to appoint by will cannot be executed by deed. In the second place, a covenant to appoint by will in a particular way cannot be the subject of specific performance or have any legal operation: *Palmer* v. *Locke.* (6) In the third place, an exercise of the power by will is not rendered invalid by reason of the fact that the appointor has covenanted to make such an

(1) (1869) L. R. 8 Eq. 408, 415.
(2) [1892] 3 Ch. 510.
(3) 1 H. & M. 730.
(4) (1889) 40 Ch. D. 418.
(5) [1892] 1 Ch. 227.
(6) 15 Ch. D. 294, 303.

appointment, there being no other circumstance which might render the appointment invalid apart from the covenant: see *Palmer* v. *Locke.*(1) In the fourth place, a release by the appointor, or a covenant by the appointor not to exercise the power, is not open to objection even though the effect of the release is for the benefit of the appointor. This is expressly enacted by the Conveyancing Act, 1881, s. 52, and decided by this Court in *In re Little* (2) and *In re Radcliffe.*(3) In the fifth place, such a release or covenant may apply either to the whole of the settled property or to a part only, leaving the power intact as to the rest of the property. In the sixth place, the appointor may covenant not to exercise his power in favour of a particular object of the power, and in such case the power could thereafter only be exercised subject to the fetter or limitation thus imposed by the negative covenant. Lastly, in so far as the whole or any part of the settled property is released from the power, it goes as unappointed to the persons entitled in default of appointment, subject to the provisions of any hotchpot clause which may be found in the settlement. If the power is to appoint by deed or will, a deed by which the appointor purports to release a portion of the fund in favour of an object of the power may be construed—ut res magis valeat—as an appointment in favour of the object. But this cannot be so if the power is testamentary only. The deed must operate as a release or not at all. [His Lordship stated the facts and continued :—]

Now, apart from authority, it seems to me reasonably clear that the effect of these deeds was to impose a fetter on Mrs. Evered's power in this sense, that she disabled herself from so appointing the fund as not to secure that each of the three sons should receive 7000*l.*, although she retained full power in every other way to appoint the fund. It has been argued by Mr. Levett that these deeds are altogether inoperative and ineffectual, and that the will is the only document which can be looked at. I am unable to assent to this view. It seems to me to be inconsistent with the provisions of the Conveyancing Act, 1881, and with the express language of the deeds. I therefore feel myself bound

(1) 15 Ch. D. 294, 303. (2) 40 Ch. D. 418.
(3) [1892] 1 Ch. 227.

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to consider what is the precise extent and operation of these deeds. It is clear that the appointment made by will, which purports to dispose of the whole settled property, does prevent each of the three sons from receiving 7000*l.* cash. Each son had, under the ultimate trust in the settlement, a title to one-seventh of the whole settled fund unless and until defeated by an exercise of the power. What then is the extent to which her power of appointment was impaired or reduced or fettered by her negative covenants? She might have exercised her testamentary power by appointing 7000*l.* to the son. She might have appointed 7000*l.* to each of the other six children, leaving 7000*l.* unappointed, which would then have gone, having regard to the hotchpot clause, to the son in whose favour no appointment was made. But subject to these two events, neither of which happened in fact, she was bound to leave the fund unappointed to the extent necessary to leave each son 7000*l.* under the ultimate trust in default of appointment in favour of her seven children in equal shares, that is to say to the extent of 49,000*l.* In other words she retained her testamentary power over the balance or residue of the trust funds only after deducting 49,000*l.*, and the sums appointed by her will must abate accordingly. It is ascertained that the trust funds are not sufficient to provide 49,000*l.* plus 60,000*l.*

Neville J. has held that the only effect of the deeds is that 7000*l.* is to be deducted from the 10,000*l.* appointed in favour of the particular son and his issue, so that each of the three sons will take 7000*l.* by virtue of the deeds and 3000*l.* settled under the will. Now it is obvious that this is really treating the deeds as appointments and is directly opposed to the settled doctrine that a testamentary power cannot be exercised by deed. The learned judge considered himself bound to arrive at this conclusion in deference to the decision of Wood V.-C. in *Davies* v. *Huguenin*. (1) I have examined the pleadings and the decree in that case. Under the settlement a father had a power to appoint by will certain real estate in favour of all or any of his children. If no appointment was made, a sum of 6000*l.* was to be raised under the trusts of a term of 500 years for the younger

(1) 1 H. & M. 730, 741.

children of the marriage equally. There was no power of appointment over the 6000*l.* The father, on the marriage of Harriet, one of his younger children, covenanted that he would not exercise any appointment or do any act to defeat, lessen, or diminish the share to which Harriet was or became entitled to in the pecuniary division or portion made and secured for his younger children, and that he would execute all acts and deeds requisite to confirm Harriet's share so that she should receive for her share and proportion the sum of 1500*l.* at least. The father subsequently by his will appointed the real estate to his eldest son in fee, charged with 3000*l.* for the benefit of his daughter Elizabeth and 1000*l.* for the benefit of his daughter Harriet. The testator had six children, three of whom predeceased him. The main question which arose was as to the meaning of the trust in favour of younger children. The bill was filed by the persons in whom the estate was vested against Harriet and her husband and Elizabeth. No question was raised as to the rights of any of the deceased younger children. The main argument was addressed to the question whether Harriet's rights had been satisfied by the testamentary appointment of 1000*l.* together with a sum of 200*l.* which had been advanced to her. The Court held that if the 6000*l.* had been raisable it would have been divisible in four parts, and not into five, so that Harriet had not got her full share which her father had covenanted that she should not be deprived of. The judgment of the Vice-Chancellor on this part of the case is contained in four lines. "It is almost too clear for argument (though the point was raised) that the covenant by the father operated pro tanto as a release of his power; and the question is, what would have been the amount of Mrs. Huguenin's share in the 6000*l.* in default of appointment?" And by his decree he declared that the difference between 1500*l.* and what she had received was to be raised out of the inheritance. Now with profound respect for the Vice-Chancellor I am unable to follow the reasoning upon which he proceeded. In fact the 6000*l.* was not, nor was any part of it, raisable, because an appointment was made. I cannot understand on what principle it can have been held that any part of the 6000*l.* could go to

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Harriet. The case is cited in Farwell on Powers, 2nd ed., p. 16, only as an authority for the proposition that a covenant not to execute a power operates in equity, either entirely or pro tanto as the case may be, as a release of the power. This is in accord with the subsequent statutory provision in the Conveyancing Act. *Davies* v. *Huguenin* (1) was referred to by Kindersley V.-C. in *Coffin* v. *Cooper*. (2) That case itself was only a decision upon the point, which is now settled, that a testamentary appointment is not rendered invalid by reason that the appointor has covenanted to make the appointment. The Vice-Chancellor says (3): "It has been held that such a covenant so entirely precludes any testamentary appointment inconsistent with it, that the covenantee may compel the other appointees to make it good out of the shares which the donee of the power has appointed to them by will: *Davies* v. *Huguenin*. (1) I do not presume to say that that is a wrong decision; indeed, it seems to me, that it is the legitimate result of the first innovation." It is obvious that the Vice-Chancellor disapproved of *Davies* v. *Huguenin* (1), and I am not quite clear that he understood its effect. Again in *Palmer* v. *Locke* (4), which was a case like *Coffin* v. *Cooper* (2), Brett L.J. said he had some difficulty in saying that he could agree with what was held in *Davies* v. *Huguenin* (1), but even if *Davies* v. *Huguenin* (1) were held to be wrong, that would have no effect upon the decision in the case before them. I cannot find that *Davies* v. *Huguenin* (1), on the only point material in the present case, has ever been followed, or that it has ever been so commented upon with approval by text-writers as to lead to the inference that it has been adopted by the profession. In these circumstances I think that we ought to hold that *Davies* v. *Huguenin* (1) on this point is contrary to principle and ought not to be followed. That case was the basis of Neville J.'s decision. No other authority has been called to our attention which supports it, and I think, for the reasons which I have indicated in the earlier part of my judgment, the appeal ought to be allowed. It follows that the payment of 1000*l.* made under Byrne J.'s order was proper, and in adjusting the figures regard must be had to

(1) 1 H. & M. 730.
(2) 2 Dr. & Sm. 365.
(3) 2 Dr. & Sm. 375.
(4) 15 Ch. D. 294, 302.

that fact. So far as appears, Gillibrand never did receive his 1000*l.* The result is that, subject to the above adjustment of figures, each of the seven children will take 7000*l.* absolutely, and the residue will be divided rateably between the appointees under the will of Mrs. Evered.

As to the costs, I think the costs of the appeals should be paid in the same manner as the costs in the Court below were directed to be paid.

BUCKLEY L.J. The law is that the donee of a power exercisable only by will cannot by deed appoint or do any act equivalent to appointing the fund or any part of it. He cannot affirmatively by deed affect the fund in any way. But he can by deed negatively tie his own hands as to the manner in which he shall thereafter exercise his testamentary power. He can release his power or covenant that he will never exercise it (which will be equivalent to a release), or can covenant that he will not exercise it so that a defined distribution of the fund or of some part of it shall not result. Thus he may covenant that a particular beneficiary shall not have less than a certain share. In such a case he will retain his power over the whole fund, but will be restricted as to the use of the power. He will remain at liberty to exercise the power by appointing by will to that beneficiary the named sum or share, or by so appointing by will to other beneficiaries as that there shall remain unappointed such a sum as, with the assistance of a hotchpot clause, if any, shall result in the particular beneficiary receiving the named sum or share. But he will by reason of his covenant be precluded from so exercising the power as that his covenant shall be defeated. Any act purporting to be an exercise of the power which will defeat the covenant will be an invalid exercise of the power to the extent to which the covenant will be defeated. Subject to what I have to say as to *Davies* v. *Huguenin* (1), all the authorities seem to me consistent with this view of the law.

In *Green* v. *Green* (2) the donee of a power exercisable by deed or will, created by a deed of 1786, executed in 1788 a deed by which he covenanted (as he could) that the trustees of

(1) 1 H. & M. 730. (2) 2 J. & Lat. 529.

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his then approaching marriage, in case there should be younger children of the marriage, should raise 500*l.*, and directed (as he could in one event and not in another event) that that sum should be divided in such shares amongst the younger children of that marriage as he should by will appoint, and for want of appointment equally. The event in which he could not so direct was that of his having issue by a second marriage. That event happened. Lord St. Leonards held that the result was that the power of apportionment which he reserved to himself by the deed of 1788 was put an end to because it was a power to divide the fund amongst some to the exclusion of others of the class of beneficiaries. In 1842 the donee of the power appointed the fund by will, giving to two children of the first marriage 1*s.* each, and to the children of the second marriage 100*l.*, 150*l.*, and so on, that is to say, unequal sums. The principle of Lord St. Leonards' decision is to be found in the first paragraph of p. 542. It is that the deed of 1788 was a contract that the donee so far as he could bind his power bound himself to the children of the first marriage that they should take the fund equally between them and could not defeat that provision by any subsequent act. It was a decision that his power remained in him but was so qualified as that he could not exercise it so as to deprive the children of the first marriage of their right under the deed of 1788 to have the fund equally divided amongst them so far as the donee of the power could ensure that result. This is all that is material for the purpose of applying that decision to the present case. I do not know that it is necessary for me to consider the subsequent passage of the judgment which shews the manner in which upon that principle the fund was in fact held to be divisible. But it seems to me that what that paragraph means is this. The power created in 1786 was exercisable by deed. The deed of 1788 had exercised it. That execution of the power, said Lord St. Leonards, is still operative. Obviously it was, so far as it raised the 500*l.* As regards the testamentary power of appointment contained in it he had already held it was not. But under the deed of 1786 all the children (that is of both marriages) were entitled, and although

under the power in that deed he could by will apportion as he thought proper among them, yet he could not use that power to apportion, as by his will he did, in unequal sums so as to defeat the children of the first marriage of the equality promised them by the deed of 1788. That equality could only be achieved by disregarding the testamentary appointment which he had made and giving to the children of both marriages equally. However this may be, I repeat the principle to be found in the judgment as above stated is not affected by it.

In *Davies* v. *Huguenin* (1) the power was contained in a deed of November 9, 1819, by which, subject to life interests, land was settled to the use of the children in such shares as John should by will appoint and in default as Mary should by will appoint and for want of such appointment to the use of George Ripley for 500 years, and subject thereto to the use of the first and other sons of John and Mary successively and so on in strict settlement, and the trusts of the term of 500 years were that if no appointment was made by John or Mary 6000*l.* was to be raised for the portions of their children other than an eldest or only son equally to be divided between them. Unless and until an appointment was made, therefore, there was a term of 500 years to raise a sum of 6000*l.*, but if and so soon as there was an appointment there was no term of 500 years and no 6000*l.* On his daughter Harriet's marriage in 1829 John covenanted not to execute any appointment or do any act to defeat, lessen, or diminish Harriet's share in the 6000*l.*, but on the contrary to do and execute all acts and deeds for confirming and establishing Harriet's share in the 6000*l.* so as she should receive for her share 1500*l.* at least. By his will in 1852 John exercised the power (from which it resulted that there was no term and no 6000*l.*) and he appointed the lands to his son John charged with 3000*l.* for Elizabeth and 1000*l.* for Harriet. After his covenant of 1829 John the father remained in the enjoyment of his testamentary power, but limited by the operation of his covenant of 1829. He could consistently with that covenant (1.) have abstained from exercising his power, in which case the 6000*l.* would have been raisable and the number of persons to

(1) 1 H. & M. 730.

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take was such that Harriet would have received one-fourth of the 6000*l.*, i.e., 1500*l.* or (2.) have exercised the power by charging 1500*l.* on the land and appointing it to Harriet. But he exercised the power by appointing only 1000*l.* to Harriet in the form of a charge for that sum upon the land, and subject thereto appointed the land to his son John. He had therefore so exercised the power as to deprive Harriet of 500*l.* The Vice-Chancellor's decision was that the 500*l.* must be raised out of the inheritance which under the appointment had gone to the son John. My difficulty in understanding the case is to see how in the facts of that case John the father could have ensured the 1500*l.* to Harriet by abstaining from doing acts, except by abstaining from the act of appointing at all. After the execution of the covenant he remained entitled to exercise the power in any way which would result in her obtaining 1500*l.*, but not in any other way. He remained entitled, therefore, to appoint her 1500*l.* or to appoint to anybody else (being an object of the power) so long as she would get 1500*l.* But by appointing to John and giving her only 1000*l.*, he made such an appointment as that she would not get 1500*l.* This was an exercise of the power (limited as it had become by the covenant) which was in breach of the covenant. If by reducing the amount coming by the appointment to John a larger sum would have resulted to Harriet so as to make her share up to 1500*l.* it would have been a valid exercise to the extent of that reduced amount. But no reduction of the amount coming to John would have resulted in giving Harriet more unless the donee had affirmatively appointed her more. The covenant could not have affirmative effect so as to pass 500*l.* to Harriet by way of appointment, for that would be to allow a power exercisable only by will to be exercised by deed. The Vice-Chancellor uses the expression "release pro tanto." By this expression I think is meant an abandonment of the capacity to exercise the power in any way whereby his covenant shall be defeated. I entirely agree. It is with the greatest reluctance and diffidence that I venture to criticize a judgment of Sir W. Page Wood, but I am bound to say that while I agree entirely that the covenant operated as a release pro tanto, I cannot see how the judgment gave effect to

such release. I cannot help thinking that the Vice-Chancellor overlooked the fact that he was giving effect not to a fetter upon the power, but in fact to an exercise of the power by deed when it was exercisable only by will. The question was not how the 6000*l.* was divisible, but how it would have been divisible if there had been, which there was not, a sum of 6000*l.* to divide. It was necessary to suppose a sum of 6000*l.* for the purpose of saying what was the proper measure of Harriet's rights having regard to the covenant of 1829. But the property in the events which happened was not the 6000*l.*, but the property discharged from the term. For the term was non-existent in the facts which happened. The Vice-Chancellor must, I think, have overlooked the fact that the power was not exercisable by deed; that Harriet could get no part of the property except by the exercise of the power in her favour; and that it was impossible to give effect to a covenant by deed which should thus operate upon property over which the donee had power only by will. For the purpose of the present case, however, I do not find any difficulty in the principle of *Davies* v. *Huguenin*. (1) It seems to me to affirm a true principle, but, speaking with the greatest respect, to misapply the principle to the facts.

Under the settlement of 1857 Mrs. Evered had a power to appoint amongst children and issue in such shares and with such limitations over, &c., and to vest at such times as she should by will appoint, and for want of such appointment the trust funds were divisible amongst the sons who attained twenty-one and the daughters who attained that age or married equally, with a hotchpot clause under which a child taking any part under an appointment was to bring the appointed sum into hotchpot, and an appointment for the issue of a child was for the purposes of the clause to be deemed an appointment to the child. The question is as to the effect of the four deeds of July 9, 1901, August 23, 1901, June 4, 1902, and October 29, 1902. For the purposes of this judgment it is sufficient to consider the provisions of one of them, and the best for my purpose is the last, namely, that of October 29, 1902. That was a deed in favour of

(1) 1 H. & M. 730.

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Everard. By the earlier deed of July 9, 1901, Mrs. Evered had covenanted so far as Everard was concerned that she would not exercise her testamentary power so as to reduce his share to less than 7000*l.* nor so as to postpone the vesting in possession of 7000*l.* in him beyond the date of her own death, subject to a proviso, which I need not stay to consider, that nothing in that deed of 1901 should operate to limit her testamentary power except as to a matter not relevant to my present purpose. By this subsequent deed of October 29, 1902, she recited that she was desirous that Everard should forthwith receive 1000*l.*, part of the 7000*l.*, and expresses herself so far to release her power as that Everard's share shall be at least 7000*l.* and contracts not to exercise her power so that it shall be less than that sum or so that the vesting thereof in possession shall be postponed beyond her death, and she covenants that she will not exercise her power so as to reduce his share to less than 7000*l.* nor so as to postpone such vesting, and she releases her life interest as to 1000*l.*

The law to be applied, I think, is that on the one hand she could not by deed presently give him any interest whatever, but that on the other she could by deed preclude herself from subsequently exercising her power so as to reduce his interest to less than the amount named. She could do nothing affirmatively by way of appointment. But she could negatively tie her own hands so that she should not thereafter do any act which should be in derogation of her covenant. It is not disputed that the share, namely, 7000*l.*, that Everard was to have was to be a sum of 7000*l.* to which he was to be absolutely entitled. I think this is right upon the construction of the deeds. A subsequent gift of a settled 7000*l.* of which he was tenant for life would not be giving him such a share as contemplated by the covenant. After execution of this deed Mrs. Evered was, I think, bound negatively to the extent that she could not thereafter do any act from which it would result that Everard should receive less than 7000*l.* She had executed a will which remained in operation at her death, and by the will she by way of exercise of the power appointed to Everard more than 7000*l.*, namely, 10,000*l.* and more, but gave it only in settlement, making him tenant for life, and she made other like appointments the result of which was that the whole

fund was disposed of and that Everard got no sum of 7000*l.* absolutely. In my opinion after the execution of the covenant that exercise of the power was beyond her capacity. She could thereafter only so deal with the fund as that Everard should receive 7000*l.* either by way of appointment to Everard for an absolute interest or by appointments to others so made as that the 7000*l.* or the balance not given to him absolutely by appointment should come to him in default of appointment. She could not by her covenant bind herself to give it him, but she could by her covenant bind herself to abstain from dealing with the fund so that he should not get it. Where there is as in this case a hotchpot clause it may be sufficient to leave unappointed the amount and no more than the amount which the covenantee is to receive. For if every other beneficiary has already received by appointment a certain sum the entirety of the unappointed sum may by the operation of the hotchpot clause come to the covanentee. But where as in the present case the covenantee is to take absolutely and the persons taking by appointment under the will take in settlement that result does not ensue. Seeing that Mrs. Evered chose by her will to appoint in settlement, she could not ensure that the 7000*l.* should come to Everard absolutely except by either appointing 7000*l.* to him absolutely or leaving 49,000*l.* unappointed. She did not appoint 7000*l.* to him absolutely, and, that being so, her capacity to appoint in settlement did not extend to more than so much of the fund as remained after deducting 49,000*l.* and leaving that to go in default of appointment. Her will, therefore, can operate only upon so much of the fund as is the balance over 49,000*l.* That balance of 49,000*l.* must go as unappointed, with the result that not Everard only but every other child, including the daughter, will take 7000*l.* This being the effect of the one deed which I have considered, it is unnecessary to consider the other deeds for this reason, that inasmuch as it results from 49,000*l.* being left unappointed that every son will get 7000*l.* the obligations of the donee of the power under the other deeds are satisfied. In my judgment the declarations made by Neville J. do not correctly give effect to the rights of the parties. That order, I think, should be discharged, and there should be substituted a

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declaration that having regard to the four deeds of July 9, 1901, August 23, 1901, June 4, 1902, and October 29, 1902, the will of Mrs. Evered operated only as an appointment of so much of the funds over which she had under the settlement of December 14, 1857, a power of appointment as remained after deducting the sum of 49,000*l.*, and that the said sum of 49,000*l.* passed under the said settlement as in default of appointment. The rest of the order will require to be altered in such manner as results from this declaration. (1)

KENNEDY L.J. I have had an opportunity of reading and fully considering the consentient judgments of the Master of the Rolls and Buckley L.J. They have stated fully the grounds upon which it appears to me the decision of Neville J. ought to be reversed. I agree both with their reasons and with their conclusions.

Solicitors: *J. E. Hetley; Woodcock Ryland & Parker, for Preston & Francis, Bournemouth; Ford, Lloyd, Bartlett & Michelmore; Lawrence, Graham & Co.*

(1) The question upon which this case is reported was argued on the basis of the figures given in this report, but in working out the order of the Court complicated questions of election arose which resulted in some modification of these figures.—H. B. H.

H. B. H.

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Friendly Society—Conversion into Company—Enlargement of Objects—Ultra vires—Registration of Company—Certificate of Incorporation—Conclusiveness—Injunction—Form of Action—Representative Action by Member of Company—Friendly Societies Act, 1896 (59 & 60 *Vict. c.* 25), *ss.* 8, 71—*Companies (Consolidation) Act*, 1908 (8 *Edw.* 7, *c.* 69), *s.* 17, *sub-s.* 1.

Where a registered friendly society, in avowed exercise of the powers of s. 71 of the Friendly Societies Act, 1896, passed a special resolution to convert itself into a company under the Companies Acts, with a memorandum of association annexed thereto, and obtained registration of itself as a company, and a member of the company, who had been a member of the friendly society, suing on behalf of himself and all other the members of the company, moved for an injunction to restrain the company from exercising any of the powers enumerated in the memorandum of association in excess of those allowed by the Friendly Societies Act, 1896:—

Held by Eve J. and the Court of Appeal, that the action was misconceived and that the motion ought to be refused.

Per Cozens-Hardy M.R. and Buckley L.J.: Whether, notwithstanding the certificate of incorporation, the validity of the special resolution and of the registration could have been successfully impeached by a member of the old friendly society in a properly constituted action, *quære*.

MOTION.

This was a motion by the plaintiff, Michael McGlade, suing on behalf of himself and all other members of the defendant company, claiming, in effect, an injunction to restrain the defendant company from exercising any of the powers enumerated in the memorandum of association which were in excess of the powers allowed under the Friendly Societies Act, 1896, s. 8, and the Assurance Companies Act, 1909, s. 36.

In 1861 the Royal London Friendly Society was established with the object of raising by regular and special subscription from the members a fund for the following purposes: first, the insuring a sum not exceeding £200 to be paid on the death of a member, or an endowment to be paid to the member himself on attaining a certain age; secondly, for the relief, maintenance, or

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endowment of the members, their husbands, wives, children, or kindred in infancy or sickness.

In due course the society was registered as a friendly society under the Act of 1896. In 1901 the plaintiff became an insured member of the society by taking out a policy for 11*l.* 10*s.* at a weekly premium of 2*d.*, and in 1905 he effected another policy for 5*l.* 1*s.*, maintained by a weekly payment of 1*d.* In 1908 those who were responsible for the management of the society, then grown to very large proportions, determined that it would be for the advantage of the society and its members that it should be converted into a limited liability company; and accordingly in the months of June and July, 1908, the following special resolution was passed and confirmed under s. 71 of the Act of 1896: "That the Royal London Friendly Society, established in the year 1861, and registered under the Friendly Societies Act, 1896 (hereinafter called the society), be converted in pursuance of s. 71 of the Friendly Societies Act, 1896, into a company limited by guarantee and not having a capital divided into shares under the Companies Acts, 1862 to 1900, by the name of the Royal London Mutual Insurance Society, Limited, and that the following be the memorandum of association of the company and that the articles of association now before the meeting, which for the purposes of identification are endorsed with the signature of the chairman, be adopted as the articles of association of the company."

This resolution was followed on July 31, 1908, by the registration of the company and the cancellation of the registration of the society as a friendly society under the Friendly Societies Act, 1896.

By the memorandum of association in question the objects for which the company was incorporated were stated by clause 3 to be, inter alia: (1.) To continue, develop, and extend the business carried on by the Royal London Friendly Society, and to take over and manage and apply all the funds and assets of the said society, and perform and carry out all the obligations of the said society. (2.) "To carry on the business of life insurance in all its branches, and to carry on the business of accident, employers' liability, third party, burglary and theft, fire, marine, storm,

vehicular, plate, glass, and transit-insurance. (3.) To carry on all kinds of guarantee and indemnity business and generally to undertake and carry on all kinds of insurance business whatsoever, including re-insurance business."

The action was heard before Eve J. on March 11, 1910.

Jessel, K.C., and *John Rutherford*, for the plaintiff.

Sir Edward Carson, K.C., P. O. Lawrence, K.C., and *A. C. Clauson*, for the defendant company.

Gore-Browne, K.C., and *Baden Fuller*, for the trustees of the defendant company.

EVE J., after stating the facts and referring to the special resolution and the registration of the company and the cancellation of the registration of the society as a friendly society under the Act of 1896, continued:—By s. 71, sub-s. 3, of the Act of 1896 the registration of the society under that Act became void; but its registration as a company did not affect any right or claim subsisting against the society, or any penalty incurred by the society; and for the purpose of enforcing any such right, claim, or penalty the society might still be sued and proceeded against in the same manner as if it had not been registered as a company; and every such right or claim or the liability to any such penalty would have priority, as against the property of the company, over all other rights or claims against, or liabilities of, the company. Except, therefore, for the purpose of enforcing any subsisting rights or claims against the society or its property the society was entirely superseded by the company on July 31, 1908. The company having been registered with a memorandum containing powers largely in excess of any which the society enjoyed as a friendly society, the business was extended in accordance with those enlarged powers, and carried on, ever since the registration of the company, upon a very extensive scale. In November, 1909, and January, 1910, a case came before Joyce J. and the Court of Appeal (1) in which a member of a friendly society, contemplating conversion into a company with a memorandum not altogether dissimilar to the one now before me, brought an action against the managers and officers of

(1) *Blythe* v *Birtley*, [1910] 1 Ch. 228.

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the society to restrain them from proceeding with the conversion contemplated by the special resolution, on the ground that the incorporation of the proposed company would be an act ultra vires of the society. The case having been argued on an application for an interlocutory injunction, Joyce J. and subsequently the Court of Appeal held that the plaintiff was entitled to his injunction; and I need hardly say that if the defendant company in this case was in the same position as was the society in that case I should have had no alternative but to follow that decision. But here the position is essentially different; the defendant company has been registered as a company since July 31, 1908. This is not an application to restrain registration, and indeed, until the Court of Appeal put the construction which they have now put upon s. 71 of the Act of 1896, the plaintiff never had any idea of taking proceedings to obtain the injunction for which he is now asking. And when he did determine to sue he was met with the difficulty that he could only do so as a member of the company, suing on behalf of himself and of other members. By his action he claims an injunction, putting it shortly, to restrain the defendant company from exercising any of the powers enumerated in the memorandum of association which are in excess of the powers of the society while registered as a friendly society. The question on this motion is whether he has made out his right to such an injunction, and, inasmuch as this is a question which can be as conveniently determined on the hearing of an interlocutory application as at the trial of the action, I do not think it is necessary for me to consider whether the plaintiff has been guilty of any such delay, or has acquiesced to such an extent as would in another set of circumstances deprive him of his right to relief on an interlocutory application; and for all practical purposes I treat this as a motion intended to raise the issue which the parties desire to have determined and for the determination of which the action has been launched. On behalf of the plaintiff the argument is put in this way: first it is said the Court of Appeal has decided that the defendant company is one of which the registration, if not completed, would be restrained by the Court. That I concede to the plaintiff. I think that as the

law stands at present that position is unassailable. Then it is said, that the company having been registered with a memorandum shewing on the face of it that the company is a converted friendly society, and therefore incapable by reason of a disqualification or infirmity affecting its very birth of assuming the powers contained in its memorandum, the Court, having notice on the face of the memorandum that the company was born with that hereditary infirmity or taint, ought now to restrain it from exercising any powers which it would have been restrained from assuming had the plaintiff interfered at an earlier stage, and so prevented the registration being completed. As against this it is pointed out in the first place that the plaintiff is suing as a member of the corporation, that he has elected, by the form of action which he has brought, to treat the corporation as duly incorporated and as one of which he is a member; and, having elected to sue in that capacity, and in that capacity only, he comes to the Court as one of a body of persons who are bound by what is equivalent to a mutual covenant to carry on the corporation for the purposes for which it was primarily established. It is further said that, apart from any difficulty attaching to his own position, neither he nor any one else can, at this stage, successfully assert that this corporation has not been properly registered, because, under the statute, the certificate of incorporation itself is to be treated as conclusive evidence, not only that all the preliminary acts of procedure which are necessary for the incorporation of a company have been duly complied with, but that the corporation itself is a body authorized to be registered and duly registered under the Act.

Now the real foundation of the plaintiff's complaint is that this corporation ought never to have been registered—in fact that it was not authorized to be registered; that the only authority which the society possessed was to register a company with objects limited to those enumerated in s. 8 of the Friendly Societies Act, 1896; and that, therefore, the society was doing an act which it had no statutory authority to do when it purported to register this company. The question is whether I can so far go behind the certificate of incorporation as to investigate the authority of those purporting to register the company and consider

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whether that authority was limited to the registration of another kind of company or extended to the registration of this company. I do not think I can. I think the words of s. 17 of the Act of 1908 are altogether too strong, and I respectfully agree with what was said by the Vice-Chancellor in Ireland, that one must give to those words—the words with which the first sub-section of s. 17 concludes—the only sensible meaning which they will bear, that is, the meaning in which, according to their natural import, they were used, making the certificate conclusive, not only as to preliminary requirements, but also as to the particular company registered being one which the Act authorizes to be registered. The observations of the Vice-Chancellor to which I have referred are to be found in the case cited by Sir Edward Carson, *In re The Ennis and West Clare Ry. Co.* (1); and the particular passage in the judgment is at p. 104. But the whole case is instructive; the original company was a statutory company empowered to construct a railway. The undertaking became abortive and no part of the line was ever constructed. Instead of applying for an abandonment Act, the company, with a view to making the parliamentary deposit assets of the company available for all the creditors, resorted to the device of registering the company as a limited company under the Act of 1862, and then found a creditor to present a petition for the winding up of the incorporated company. It was argued, when ultimately some application was made in the winding up to enforce a liability against some of those who had been active in promoting this limited company, that the whole incorporation of the limited company was unauthorized by the special Act, and that the Court had no jurisdiction to make the winding-up order, but the Vice-Chancellor held that he could not accede to that argument in that he could not go behind the certificate of incorporation and embark on the inquiry whether the persons purporting to register the limited company had or had not authority so to do. So it seems to me in this case I am not entitled to go behind the certificate of incorporation and investigate whether the particular society which promoted this incorporation had or had not authority to register such a company. I must

(1) (1879) 3 L. R. Ir. 94.

hold that the certificate of incorporation is conclusive, and, so holding, I must assume the company was one authorized to be registered. That, however, does not altogether dispose of the case made by counsel for the plaintiff, because he puts this further point, that even so it may still be competent for the Court to recognize the company as registered, but still to say that the company is not entitled to exercise these excessive powers. The difficulty I feel about that is that in order to ascertain what limit should be placed on the company's powers it is necessary again to inquire into the authority under which the incorporation was brought about. Counsel says I must look at the Friendly Societies Act and I shall find there the limitations which are imposed upon friendly societies, and I must hold that those limitations are in some way so imposed upon a limited company which originated as a friendly society as impliedly to restrain it from exercising any powers conferred upon it as a limited company in excess of the powers it possessed as a friendly society. I think the fallacy underlying that argument is that you cannot treat a legal entity as different from that which it is. It is not half friendly society and half company—it is either one or the other; and when it ceases to be the one it becomes the other and does not translate into its new existence the infirmities with which its former existence was burdened.

In those circumstances I must refuse this motion, and inasmuch as I have heard it upon its merits, I shall, I think, be doing what is right if I refuse it with costs.

The plaintiff appealed. The appeal came on for hearing on May 5, 1910.

G. M.

C. A.

Jessel, K.C., and *John Rutherford*, for the appellant. This case falls within the principle of *Blythe* v. *Birtley*. (1) Whereas it is competent under s. 71, sub-s. 1, of the Friendly Societies Act, 1896, for a friendly society to convert itself into a company under the Companies Acts, after incorporation it still remains a friendly society for the purposes of its scope and objects, and all these extended powers contained in the memorandum of association are illegal. Under that section a company cannot be called into

(1) [1910] 1 Ch. 228.

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existence to carry on a business other than a friendly society's business; everything beyond that business is an illegal object, and the Court will restrain the company from pursuing those objects. This company is carrying on an extended life insurance business far beyond the scope of the Friendly Societies Act. Every limited company is subject to certain statutory restrictions, and it cannot by inserting in its memorandum a clause that it shall not be subject to those restrictions remove them: *Bisgood* v. *Henderson's Transvaal Estates, Ld.* (1) A friendly society which has been converted into a company is subject to certain disabilities beyond those to which an ordinary limited company is subject, and the plaintiff, as a member of such a company, though bound by the memorandum of association, is entitled to ask that the carrying on of this extended business, which is absolutely prohibited by Parliament, shall be restrained, and therefore so much of the memorandum as purports to confer these extended powers upon the company ought to be disregarded altogether. The observations of Lord Macnaghten in *Amalgamated Society of Railway Servants* v. *Osborne* (2) apply to this case: "It is a broad and general principle that companies incorporated by statute for special purposes, and societies, whether incorporated or not, which owe their constitution and their status to an Act of Parliament, having their objects and powers defined thereby, cannot apply their funds to any purpose foreign to the purposes for which they were established, or embark on any undertaking in which they were not intended by Parliament to be concerned."

Sir Edward Carson, K.C., Gore-Browne, K.C., and *A. C. Clauson,* for the defendant company, were not called upon.

Baden Fuller watched the appeal on behalf of the trustees of the company.

COZENS-HARDY M.R. This is an appeal from a decision of Eve J. The appellant asks for an interlocutory injunction to restrain the defendant company, a limited company, from in any way carrying on the friendly society except as and for the purpose of a friendly society under the Acts applicable to such societies. The facts which alone I need state are these. There was a society

(1) [1908] 1 Ch. 743, 758. (2) [1910] A. C. 87, 94.

called the Royal London Friendly Society. That society was registered under the Friendly Societies Act, 1896; it was a society of which the plaintiff was a member, and that society passed a special resolution as follows: (His Lordship read it). That was taken to the Registrar of Companies, and a certificate of registration was issued by him nearly two years ago. The plaintiff says, and for the present purpose I assume he is right, that that special resolution was not competent to the society; but he goes on to say by his writ, "The defendant company is a limited company, and I sue it as such; it is not only a limited company, but it is a company of which I am a member, and I sue the company in that character"; and, admitting that he is a member of this limited company, he asks that the limited company may be restrained from carrying out part of the objects found in its registered memorandum of association. I know of no principle or authority which can justify such relief being given in a case like this. It is said that this is inconsistent with the view which this Court took in the recent case of *Blythe* v. *Birtley*. (1) I do not see that it is in any way inconsistent with it. I do not desire to qualify or retract a single word that I said in that case, nor do I think that by proper proceedings the members of the old friendly society might not have in one way or another presented a plausible case, and very possibly a successful case, for the aid of the Court, even after the certificate of incorporation had been issued. I think it might have been competent for a member to commence an action, suing on behalf of himself and all other the members of the friendly society, asking for a declaration that the special resolution was ultra vires and that all proceedings under it were therefore void. That is entirely inconsistent with the relief claimed in this action, and on that short ground, which is substantially the ground on which Eve J. based his decision, I think that this action is misconceived, that the application for an injunction was wrong, and that therefore this appeal fails and must be dismissed with costs.

BUCKLEY L.J. The Royal London Friendly Society, established in the year 1861, and registered under the Friendly

(1) [1910] 1 Ch. 228.

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Societies Act, 1896, passed in June and July, 1908, certain resolutions. They were resolutions that the friendly society be converted into a company and that "the following be the memorandum of association of the company." I am reading the special resolution quite shortly. Appended to the special resolution was a memorandum of association containing the objects of the company. On July 31, 1908, the corporation was registered with that memorandum of association. It is said—we have not heard the other side, but it seems to me truly said—that the objects defined in that memorandum of association were such as that the passing of that special resolution was not the passing of a special resolution such as the society could legitimately pass to convert the friendly society into a company, and that, according to the decision of this Court in *Blythe* v. *Birtley* (1), if an application had been made to the Court to restrain the registration of this special resolution it would have succeeded. For the purpose of what follows I shall assume that this special resolution was not a special resolution to convert the friendly society into a company, meaning such a company as it could convert itself into. In that state of things s. 71, sub-s. 2, of the Friendly Societies Act, 1896, provides that in an event, but only in an event, a copy of the resolution under the seal or stamp of the Central Office shall have the same effect as a memorandum of association duly signed and attested under the Companies Acts. What is there here? There is no memorandum of association signed by seven persons under the Companies Acts. There is a document which, if the contingency in s. 71, sub-s. 2, had been satisfied—if, that is, a special resolution converting the society into a company had been passed and had contained the proper particulars—would have been a memorandum of association. I could understand a plaintiff coming here to contend that, having regard to *Blythe* v. *Birtley* (1), there was no such special resolution that there was therefore no memorandum of association, and no registered company under the Act of Parliament. Against that contention, no doubt, might have been raised a contention based upon s. 1 of the Act of 1900, which was the Act then in force, which provides that "A certificate of incorporation given by the registrar in respect

(1) [1910] 1 Ch. 228.

of any association shall be conclusive evidence that all the requisitions of the Companies Acts in respect of registration and of matters precedent and incidental thereto have been complied with, and that the association is a company authorised to be registered and duly registered under the Companies Acts." An exceedingly serious question I think exists on which I am not going to express any opinion whether the steps which this society has taken have any validity. It seems to me that that question might have been raised in more than one way. I apprehend that this plaintiff could have come here and said, "I was a member of the friendly society, and I am so still, because I say that there have never been carried out proceedings under the Friendly Societies Act so as to result under s. 71, sub-s. 3, in the vacation of the registration of the friendly society: I say that the friendly society still exists, that I have never become a member of the corporation. I sue for a declaration that I am not a member of the corporation; that the friendly society could not convert me into a member of such a corporation; and I ask for relief based upon these contentions." He might also, probably, have commenced proceedings challenging the registration in toto, not merely challenging his membership of the corporation, but challenging the existence of the corporation, and have sued for a declaration that the registration was invalid, and that there was no such corporation. Probably the same question could have been raised in a third form. This memorandum of association provides that "in the carrying on of the society's business"—that is to say, of the business taken over from the friendly society—"the following fundamental condition shall be observed, that the policies of the Royal London Friendly Society immediately before the registration of this society are to be binding on this society." I can conceive an action in which a policy-holder of the friendly society might have sued for a declaration that his contract had not been taken over by the corporation, again asserting that there was no such corporation, that they could not carry out this transaction, and that he was entitled to continue to pay his premiums as they from time to time fell due to the society, and that it was a valid continuing contract with the society. In any one of these

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forms it seems to me this question might have been raised. But what is the action with which we have to deal? It is an action in which the plaintiff sues on behalf of himself and all other the members of the company incorporated under the Companies Acts, and the defendants are the corporation incorporated under the Companies Acts, and he sues for a declaration, to put it shortly, that so much of the business described in the memorandum of association as is larger than that of the friendly society is illegal and void, and for an injunction restraining the corporation from carrying on such business. It is an action in which he comes here and affirms the existence of the corporation; says he is a member of the corporation, and seeks to restrain the corporation from carrying out some of its objects. That is an impossible action.

The argument which we have heard on this part of the case is that a great part of the company's ostensible objects are not its objects because it could not take such objects, and that, upon some principle which I fail altogether to understand, we are to read this memorandum as if half of it or three-quarters of it, or whatever the proportion may be, were expunged and the balance survived. The plaintiff does not contest that there is such a corporation, but says that its objects do not include these objects. It appears to me that he is confronted by the Act of Parliament. If there is such a corporation the Act of Parliament says that to find what its objects are you have simply to read the memorandum of association. If you read it you will find that all these things which the plaintiff seeks to restrain the corporation from carrying on are within its objects. Such an action seems to me impossible. The action was commenced, no doubt, for the purpose of seeking a decision on a question which is I think a grave one, and one which requires decision, but the action is brought in such a form that it is perfectly impossible to determine that question. On these grounds I think the injunction was rightly refused.

KENNEDY L.J. I agree.

Solicitors: *Leggatts & Carruthers, for Carruthers & Gedye, Liverpool; Kingsley Wood & Co.*

H. B. H.

In re THURSBY'S SETTLEMENT. GRANT *v.* LITTLEDALE.

[1910 T. 119.]

C. A. 1910 *May* 28; *June* 2.

Power of Appointment—Revocation—Settlement—Special Power—Investment of Part of Trust Fund in Real Estate—Appointment of Real Estate with Power of Revocation—Subsequent Appointment of Whole of Trust Fund without Reference to previous Appointment—Inconsistency—Equitable Interest—Absence of Words of Inheritance.

A marriage settlement conferred upon the husband and wife a joint power to appoint the trust moneys, stocks, funds, and securities comprised in the settlement amongst children and issue, and the settlement contained a power to invest the trust funds in the purchase of real estate. The husband and wife appointed certain real estate purchased out of the trust funds, upon trust upon the death of the survivor for their eldest son, his heirs and assigns, with a power of revocation and reappointment, and subsequently, without referring to the previous appointment, they, in exercise of the power of appointment given to them by the settlement and of every other power enabling them in that behalf, appointed the whole of the trust moneys, stocks, funds, and securities comprised in the settlement, upon trust (subject to their respective life estates) for all their children equally:—

Held, that the second appointment was not a revocation of the first.

Per Farwell L.J.: *Semble*, if the second appointment had operated to pass the real estate, having regard to the absence of words of inheritance, the children would have taken life estates only.

In re Tringham's Trusts, [1904] 2 Ch. 487, and *In re Oliver's Settlement* [1905] 1 Ch. 191, explained.

Appeal from a decision of Warrington J.

By a settlement dated April 27, 1859, and made upon the marriage of Mr. and Mrs. Thursby certain funds belonging to the wife were assigned to two trustees, their executors, administrators, and assigns, upon trust to invest the same in the investments therein mentioned, which included the purchase of freehold or copyhold hereditaments in England and Wales, and the trustees were directed to "stand and be possessed of and interested in the said trust moneys and premises hereinbefore assigned or expressed and intended so to be and of and in the stocks funds and securities

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whereon the same shall from time to time be invested" upon the trusts thereinafter declared. Then certain special trusts were declared as to a sum of 6000*l.* which was to be kept separate from the residue of the trust moneys, and it was thereby agreed and declared that the trustees should "stand and be possessed of and interested in all and singular the said trust moneys and premises hereinbefore assigned or expressed and intended so to be and of and in the stocks funds and securities in or upon which the same shall from time to time be invested" upon trust to pay the annual produce thereof to the wife for life for her separate use and after her death to her husband for life, and after the death of the survivor upon trust to stand possessed of and interested in "the said trust moneys stocks funds and securities" and the annual produce thereof in trust for the children or remoter issue of the wife born in her lifetime as the husband and wife should jointly, or if the wife should survive the husband as the wife should, by any deed or deeds with or without power of revocation from time to time appoint.

There were five children of the marriage, of whom Arthur Edmund Thursby was the eldest.

In 1869 the trustees invested a portion of the trust funds in the purchase of a freehold estate known as the Priors Hardwick Estate.

By a deed poll dated May 23, 1895, the husband and wife, after reciting that a portion of the trust funds had been invested in the purchase of the Priors Hardwick Estate, in exercise of the power for that purpose given to them by the settlement and of every other power (if any) in that behalf them enabling, appointed that from and after the decease of the survivor of them the said hereditaments should be held in trust for their eldest son, Arthur Edmund Thursby, his heirs, executors, administrators, and assigns, and the deed reserved to the husband and wife during their joint lives and to the wife if she should survive her husband power to revoke the appointment and to appoint or declare other trusts concerning the same.

On March 4, 1898, the husband and wife executed a further deed poll which recited fully the trusts of the settlement and the power of appointment over "the said trust moneys stocks funds

and securities," but did not mention the appointment of 1895, and recited also that the husband and wife were desirous of appointing "the trust moneys stocks funds and securities (other than the said hereinbefore mentioned sum of 6000*l.*) subject to the trusts of the hereinbefore recited indenture of settlement" in favour of their five children (naming them), and by the operative part the husband and wife, in exercise of the power for that purpose given them by the settlement and of every or any other power enabling them in that behalf, directed and appointed that the trustees of the settlement should from and after the death of the survivor of the husband and wife and in the meantime subject to their respective life interests stand possessed of "the trust moneys stocks funds and securities (other than the said hereinbefore mentioned sum of 6000*l.* and the stocks funds and securities representing the same) comprised in or which are now or hereafter may be subject to the trusts of the hereinbefore recited indenture of settlement in trust for" all the children of the marriage (naming them) "in equal shares," and the deed contained a power of revocation similar to that contained in the deed of 1895.

Mary Anne Thursby (the wife) died on August 10, 1900.

Arthur Edmund Thursby (the eldest son) died on March 6, 1902.

Arthur Harvey Thursby (the husband) died on June 21, 1909.

An originating summons was taken out by the trustees of the settlement for the determination of the question (inter alia) whether the appointment made by the deed poll of May 23, 1895, of the Priors Hardwick Estate in favour of Arthur Edmund Thursby was to any and, if so, to what extent revoked or otherwise affected by the subsequent appointment by the deed poll of March 4, 1898.

Warrington J. held that the husband and wife had by the second appointment in terms disposed of the property already appointed in a manner inconsistent with the previous appointment and that that in itself amounted to an exercise of the power of revocation. He therefore held that the deed of 1895 was wholly revoked by the deed of 1898.

The representatives of the eldest son appealed.

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Cave, K.C., and *W. F. Webster*, for the appellants. In order that the second appointment should operate as a revocation of the first it is not enough to shew an intention to appoint; there must be shewn an intention to revoke. Although express words of revocation are not necessary, an appointment expressed to be made in exercise of every power enabling the appointor does not extend to property which the appointor cannot appoint without the exercise of a power of revocation, if there be other property to which the words of appointment can apply. Until the power of revocation is exercised the power to reappoint does not arise: *Pomfret* v. *Perring* (1); *Palmer* v. *Newell* (2); Farwell on Powers, 2nd ed. pp. 209, 214.

In this case it is clear that there is ample material upon which the second appointment can operate besides the Priors Hardwick Estate, and there is no reference to the prior appointment. The prior appointment is therefore not revoked by the second. Further, even supposing that the power to reappoint arises, there are no apt words to pass the Priors Hardwick Estate.

T. H. Carson, K.C., and *J. Tanner*, for younger children. An intention to revoke may be inferred from the circumstances of the case, and where the later appointment shews a clear intention on the part of the donee to part with the whole property that is a sufficient ground for inferring a revocation of the prior appointment. [Upon this point they referred to *In re Wells' Trusts* (3) and *In re Brace* (4).] Reading the deed of 1898 with the settlement of 1889 it is clear that the word "securities," in the context in which it is found, must include land and that the intention of the appointors was that the whole interest in the trust property should pass; and where there is a clear intention to pass the property absolutely and the appointment relates to equitable interests technical words of inheritance are not required to pass the fee simple: *In re Tringham's Trusts* (5); *In re Oliver's Settlement.* (6) This appointment therefore passes the Priors Hardwick Estate and it passes the fee simple.

(1) (1854) 5 D. M. & G. 775.
(2) (1855) 20 Beav. 32.
(3) (1889) 42 Ch. D. 646.
(4) [1891] 2 Ch. 671.
(5) [1904] 2 Ch. 487.
(6) [1905] 1 Ch. 191.

[*Cave, K.C. In re Tringham's Trusts* (1) is criticized in Norton on Deeds, p. 332.]

[FARWELL L.J. referred to Sugden on Powers, 8th ed., p. 441.]

H. Terrell, K.C., and *N. C. Armitage*, for another younger child. The appointment of 1898 recites fully the power in the settlement including the words "trust moneys stocks funds and securities" as being the subject-matter of the power, and in the operative part the same words are used. It is clear that the words in the settlement are used as meaning property of whatever kind in which the trust funds are invested, including real estate, and they are used in the same way in the deed of 1898. This necessarily involves the revocation of the previous appointment.

Northcote, for the trustees of the settlement.

Cave, K.C., in reply. There is no inconsistency between the two appointments. The first is an appointment of realty and the second an appointment of personalty, and effect can be given to them as they stand. The absence of the word "heirs" in the second appointment is strong to shew that land was not intended to be included therein; but, assuming that it was, the fee simple did not pass: *In re Whiston's Settlement.* (2)

Cur. adv. vult.

June 2. FARWELL L.J. This case raises the question of the construction of a deed of appointment dated March 4, 1898, whereby, in exercise of a limited power given to them by their marriage settlement "and of every or any other power enabling them in that behalf," the spouses appointed that the trustees of the settlement should stand possessed of "the trust moneys stocks funds and securities (other than 6000*l.*) comprised in or which are now or hereafter may be subject to the trusts of the hereinbefore recited indenture of settlement" in trust for all the children of the marriage equally. Warrington J. has held that these words have exercised a power of revocation and new appointment contained in a deed of May 23, 1895, whereby certain real estate which then formed part of the settled property was appointed to the eldest son in fee, and that the words "trust

(1) [1904] 2 Ch. 487. (2) [1894] 1 Ch. 661.

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moneys stocks funds and securities," &c., are sufficient to carry such real estate and to carry it in fee.

I am unable to agree with him.

The law as to powers of revocation and new appointment has been settled for more than fifty years by *Pomfret* v. *Perring*. (1) A power of revocation is not a power of appointment, but is a power the exercise of which is a condition precedent to the exercise of the power of appointment in question. An appointment, therefore, in exercise of a power of appointment and of every or any other power or similar words does not prima facie refer to powers of revocation, but to powers of appointment: if and so far therefore as the intention to appoint in such a case depends on the reference to the power, it cannot be found: such words might shew an intention to execute not only the power in the particular instrument stated, but also any other power of appointment which the appointor might possess, but it does not shew any intention to execute a power of revocation.

It is, however, of course open to the claimants to shew that there are other indicia besides the reference to the power, shewing an intention to execute; for example a reference to property which can only pass by means of an execution of both power of revocation and of appointment: thus, if in the present case the appointment had been of "the Priors Hardwick Estate," the powers both of revocation and of appointment in the deed of 1895 would have been exercised because in no other way could the clear intention to pass the Priors Hardwick Estate be effected.

The question therefore next arises, can words so inappropriate as "trust moneys stocks funds and securities" be held to include this real estate? The general rule is that if there is property to which the words of appointment apply in their primary sense, so that effect can be given to the deed in its ordinary signification, the appointment is confined to its primary meaning, and this is especially the case when the Court is asked to divest an estate already vested. Take the analogous case of election: if a testator devises Blackacre which belongs to A. to B., and gives A. a legacy, A. is put to his election; but it is otherwise if the

(1) 5 D. M. & G. 775.

testator has any interest in Blackacre, for example a charge thereon, as in *Maddison* v. *Chapman*. (1) The presumption in each case is that the appointor or the testator means to deal with that which he can properly dispose of without displacing other persons' rights.

It is said, however, that the circumstances in the present case are peculiar, and in one respect they certainly are. The marriage settlement of 1859 creating the power was a money settlement, but it contained in the investment clause powers "to invest on real securities or in the purchase of freehold or copyhold lands," and there is no provision for the conveyance of such lands, if and when purchased, to the trustees on trust for sale so as to preserve the character of the investments as personalty. Under this power a farm was purchased in fee in 1860, and in 1869 the Priors Hardwick Estate was purchased in fee, and this latter estate was appointed in fee to the eldest son on May 23, 1895. An ingenious argument has been addressed to us to this effect. The settlement speaks of the trust property as the "trust moneys stocks funds and securities and all and any the stocks funds and securities whereon the same shall from time to time be invested": these words (says Warrington J.) must include the lands when purchased: the words used in the appointment of 1898 are "the trust moneys stocks funds and securities (other than the 6000*l.*) comprised in or which are now or hereafter may be subject to the trusts of the settlement": therefore these latter words must also include the lands.

With great respect, this appears to me a fallacy. The lands became subject to the trusts of the settlement when purchased, not because the words "stocks funds and securities" comprise real estate, for they clearly do not, but because the trusts created by the settlement apply by necessary implication to the lands bought by the trustees out of the trust moneys in pursuance of the provisions in the deed, and which the trustees must necessarily admit that they hold on the trusts of the deed. Thus in *Allin* v. *Crawshay* (2) and *Tunstall* v. *Trappes* (3), where the marriage settlements gave the wife the income of her settled

(1) (1861) 1 J. & H. 470. (2) (1851) 9 Hare, 382.
(3) (1829) 3 Sim. 312.

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funds during coverture and were silent as to the rest of her life, it was held that the trust to pay her after coverture arose by implication, not that a trust to pay "during coverture" could be construed as meaning "during coverture and afterwards during the rest of her life."

There are three contentions open to claimants in cases like the present: they may shew that the words used are on construction wide enough to include all that is claimed by them, or they may shew that the nature of the case is such that although the words are not wide enough to express the trust that is claimed to exist, yet the Court can imply such a trust, for implication ex vi termini negatives actual expression, or they may be able to adduce evidence of common error in a suit to rectify; but this last assumes a proper case and the absence of both express and implied trust. But when the appointment of 1898 is considered, no such considerations arise. The reason for implying the trust in the settlement does not apply to the appointment. If it were not implied in the settlement, there would be a total failure of trusts respecting the land. But if it is not implied in the appointment, there is no such failure, but the existing appointment is left untouched. The fallacy in the learned judge's judgment is to assume that the purchase of the land has created a definition clause, applicable to the settlement and to every appointment under it. As I have already said, there is no case of alteration of meaning of words or of a new definition at all, but the creation of trusts by necessary implication.

Under these circumstances it is not necessary to determine the extent of the estate which the appointees would have taken under the appointment. The Priors Hardwick Estate has been appointed to the eldest son in fee, and this remains untouched. The farm bought in 1860 has not been appointed at all and goes as in default of appointment. But as the case has been argued, and a judgment of my own in *In re Oliver's Settlement* (1) relied on, I desire to say that I have never decided and do not think, that an appointment of equitable interests in land to A. or to a class without words of limitation, or under the Conveyancing

(1) [1905] 1 Ch. 191.

Act, can carry more than a life interest to the appointee. It is not absolutely necessary to have the technical words as in the case of legal estates in land; but there must be circumstances such as Joyce J. found in *In re Tringham's Trusts* (1), and I found in *In re Oliver's Settlement* (2), sufficient to shew an intention that the fee should pass. I can find nothing of the sort here, so that if the five children had taken under the appointment they would have taken life estates only.

In my opinion this appeal must be allowed.

COZENS-HARDY M.R. I agree.

KENNEDY L.J. I agree in the conclusion at which Farwell L.J. has arrived, and generally in the reasoning by which that conclusion has been reached. I express no opinion in regard to the decisions in *In re Tringham's Trusts* (1) and *In re Oliver's Settlement.* (2)

Solicitors: *Robins, Hay, Waters & Hay; Evans, Wadham & Co., for Cruttwells, Daniel & Collings, Frome.*

(1) [1904] 2 Ch. 487. (2) [1905] 1 Ch. 191.

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April 7, 8, 9, 11, 12, 13.

STANCOMB *v.* TROWBRIDGE URBAN DISTRICT COUNCIL.

[1895 S. 2869.]

Practice—Execution—Enforcing Order against Corporation—Writ of Sequestration—Injunction to restrain Sewage Nuisance — Undertaking to cleanse Stream — Breach of Injunction — Non-performance of Undertaking— "Wilful disobedience"—Rules of the Supreme Court, 1883, *Order* XLII., *r.* 31—*Solicitor and Client Costs.*

Where a person or corporation is restrained by injunction from doing a particular act, the person or corporation commits a breach of the injunction, and is liable to process for contempt, if he or it in fact does the act, and it is no answer to say that the act was not contumacious, in the sense that in doing it there was no direct intention to disobey the order.

The expression "wilfully" in Order XLII., r. 31, is intended to exclude only casual or accidental and unintentional disobedience to an order of the Court.

Fairclough v. *Manchester Ship Canal Co.*, [1897] W. N. 7, and *Attorney-General* v. *Walthamstow Urban Council*, (1895) 11 Times L. R. 533, followed.

In the case of a corporation, such as an urban district council, which can only act by its servants or agents, if the act is in fact done, the corporation cannot escape liability for its commission by proving that it was done by its servant or agent through carelessness, neglect, or even in dereliction of his duty.

Rantzen v. *Rothschild*, (1865) 14 W. R. 96, followed.

By an order of Court the defendants were restrained by injunction from sending sewage into a stream, and by the same order they undertook to cleanse the stream. They committed breaches of the injunction and failed to cleanse the stream in accordance with their undertaking.

The Court directed a writ of sequestration to issue against the defendants, but to lie in the office for six months, and not to issue at all if within that period the defendants performed their undertaking to the satisfaction of a person agreed upon by the parties, and ordered the defendants to pay the plaintiffs' costs as between solicitor and client.

MOTION.

The action was brought by the plaintiffs for an injunction to restrain the defendants, the Trowbridge Urban District Council, from causing or permitting the sewage of their district to flow or

pass through any sewer constructed by them or their predecessors, the local board, into the stream or natural watercourse known as the Biss on the Cockhills Farm, of which the plaintiff William Stancomb was the owner and the plaintiff Edmund Moore Francis was the tenant, to such an extent or in such a condition as to cause a nuisance or injury to the plaintiffs or either of them; and for damages.

By an order dated January 17, 1896, and made by consent, the defendants were perpetually restrained from causing or permitting any of the sewage of their district to pass through any sewers belonging to them into the stream in question, and by the same order the defendants undertook at the expiration of a certain period, which had expired, thoroughly to cleanse the bed and banks of the stream from all sewage deposits from the highest present outfall to the point where the stream ceased to flow through or adjoin the plaintiffs' property.

The injunction was suspended from time to time, and the last period of suspension expired on October 1, 1909, and thereupon the injunction became effective.

The plaintiffs complained that since October 1, 1909, the defendants had, notwithstanding the injunction, caused or permitted the sewage of their district to pass through sewers belonging to them into the stream, and they further complained that the defendants had failed to perform their undertaking thoroughly to cleanse the bed and banks of the stream from all sewage deposits.

The plaintiffs now moved under r. 31 of Order XLII. (1) for an order that they might be at liberty to sue out a writ of sequestration directed to commissioners to be therein named to sequester the goods, chattels, and personal estate and the rents, issues, and profits of the real estate of the defendants for their contempt of Court in wilfully disobeying the order of January 17, 1896, and in not performing the undertaking given in that order.

(1) Rule 31 of Order XLII. provides: "Any judgment or order against a corporation wilfully disobeyed may, by leave of the Court or a judge, be enforced by sequestration against the corporate property, or by attachment against the directors or other officers thereof, or by writ of sequestration against their property."

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The motion was heard with witnesses.

Cave, K.C., and *T. J. C. Tomlin*, for the motion.

Macmorran, K.C., and *E. H. C. Wethered*, for the defendants. The motion is of a twofold character, namely, (1.) in respect of the disobedience of the injunction, and (2.) in respect of the non-performance of the undertaking. As regards the first part of the motion the plaintiffs in order to bring the case within r. 31 must shew that the disobedience to the order was wilful in the sense of its being contumacious. It is not enough that the disobedience is casual, or accidental and unintentional: *Fairclough* v. *Manchester Ship Canal Co.* (1) That case, no doubt, is not quite consistent with the judgment of Chitty J. in *Attorney-General* v. *Walthamstow Urban Council.* (2) The latter, however, was a case of public nuisance and is not parallel with the present. Upon the evidence there is nothing here to lead the Court to the conclusion that there has been a contumacious disregard of the order of the Court. Further, the matter being one of contempt, the defendants are not liable for the unauthorized acts of their servants. The breaches of the injunction were unintentional acts and were not part of a course of conduct on the part of the defendants' servant. There is no evidence of an habitual disregard of the injunction.

As regards the second part of the motion the question is one of fact, whether the cleansing of the stream has been such as to satisfy the undertaking. The defendants have acted perfectly bona fide in the matter. They have incurred considerable expense in their endeavours to cleanse the stream. Under these circumstances it is submitted no case has been shewn for the issue of a writ of sequestration.

Cave, K.C., in reply. The defendants cannot rely on *Fairclough* v. *Manchester Ship Canal Co.* (1) as an authority for the proposition that to bring the case within r. 31 the disobedience to the order must be contumacious.

[WARRINGTON J. I think that sufficiently appears from Chitty J.'s judgment in *Attorney-General* v. *Walthamstow Urban Council.* (2)]

(1) [1897] W. N. 7. (2) 11 Times L. R. 533.

Further, the defendants are responsible for the acts of their servant even if done by him in dereliction of his duty: *Rantzen* v. *Rothschild*. (1)

[WARRINGTON J. What do you ask me to do? Is it necessary in this case to direct a writ of sequestration to issue?]

I ask the Court to do what was done by Chitty J. in *Attorney-General* v. *Walthamstow Urban Council* (2), namely, to direct the writ to issue, but to lie in the office for a reasonable period.

Then as to costs it is submitted that the defendants ought to pay the plaintiffs' costs as between solicitor and client: *Lee* v. *Aylesbury Urban Council* (3); *Attorney-General* v. *Walthamstow Urban Council*. (2) [He also referred to *Sutton* v. *Barnet Local Board*. (4)]

E. H. C. Wethered in reply as to costs. Solicitor and client costs ought only to be given where there has been a contemptuous disobedience by a defendant to an order of the Court and the Court wishes to mark its disapproval of his conduct. Having regard to the works which the defendants here have erected for dealing with the sewage and to the attempts which they have made to cleanse the stream the case is not one for requiring them to pay solicitor and client costs.

WARRINGTON J. stated the circumstances under which the present application was made, and continued:—The notice of motion is dated January 14, 1910, and of course it is necessary for the plaintiffs to establish that at the date of the notice of motion the defendants had committed the breaches of the injunction complained of and had failed to perform their undertaking. The motion is made under Order XLII., r. 31, which provides: "Any judgment or order against a corporation wilfully disobeyed may, by leave of the Court or a judge, be enforced by sequestration against the corporate property."

It is contended on the part of the defendants that the acts to which I shall presently refer do not amount to "wilful disobedience," and I may at the outset state what, in my opinion, is the meaning of "wilful disobedience" in r. 31 of Order XLII.

(1) 14 W. R. 96.
(2) 11 Times L. R. 533.
(3) (1902) 19 Times L. R. 106.
(4) [1877] W. N. 167.

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In my judgment, if a person or a corporation is restrained by injunction from doing a particular act, that person or corporation commits a breach of the injunction, and is liable for process for contempt, if he or it in fact does the act, and it is no answer to say that the act was not contumacious in the sense that, in doing it, there was no direct intention to disobey the order. I think the expression "wilfully" in Order XLII., r. 31, is intended to exclude only such casual or accidental and unintentional acts as are referred to in *Fairclough* v. *Manchester Ship Canal Co.* (1) I think this view, though not of course expressed in the same words, is to all intents and purposes the view expressed in *Attorney-General* v. *Walthamstow Urban Council.* (2) In my opinion, further, the act need not be done by the person himself. In the case of a corporation it cannot be done by the corporation itself, at any rate in the case of such a corporation as an urban district council. Such a body can only act by its agents or servants; and I think, if the act is in fact done, it is no answer to say that, done, as it must be, by an officer or servant of the council, the council is not liable for it, even though it may have been done by the servant through carelessness, neglect, or even in dereliction of his duty. That seems to me to follow from *Rantzen* v. *Rothschild.* (3)

With that statement of the law I propose to state what are the facts of this case. William Stancomb, one of the original plaintiffs, was the owner of certain land in the neighbourhood of the town of Trowbridge, in part on both banks and in part on one bank only of the stream called the Biss, which, after rising somewhere in the neighbourhood of Westbury, flows through the town of Trowbridge, past the plaintiff's land, and ultimately falls into the Avon some little distance below the place which is now in question. The other plaintiff, E. M. Francis, is a tenant of a part of the land. The action was commenced by the original plaintiffs for the purpose of restraining the pollution of this stream by the sewage of the town of Trowbridge. The present plaintiff William Stancomb (junior) is the successor in title of the plaintiff William Stancomb. After the granting of

(1) [1897] W. N. 7. (2) 11 Times L. R. 533.
(3) 14 W. R. 96.

the injunction, the defendants set themselves to work to construct, and have constructed, a system of drainage for the town of Trowbridge, and, in my opinion, on the evidence which I have heard, no well-founded complaint could be made of the system as such, and, in fact, the plaintiffs do not allege that, if the system of drainage, which has been constructed by the defendants at very considerable expense, is properly worked, the effluent which ultimately flows into the Biss would be one to which they could, as riparian proprietors, properly object. But what they allege is that since the granting of the injunction, or since the injunction became effective, and before the date of the notice of motion, the defendants have caused or permitted unpurified sewage to pass into the stream; in other words, that the system of drainage, which, if properly worked, would remedy the evil they complain of, has not been properly worked. [His Lordship then described in detail the system adopted by the defendants for dealing with the sewage of their district, and, referring to the alleged breaches of the injunction, held upon the evidence that they had been proved and that they were in some instances the result of structural causes which had since been remedied, but in others of the acts of one of the defendants' servants which were neither casual nor accidental and unintentional. He continued:—] On that part of the notice of motion which deals with the breach of the injunction I think the plaintiffs have made out their case for the issue of the writ. As to whether the writ should actually issue I will say a word or two presently. [His Lordship then proceeded to consider the question whether the defendants had complied with the positive part of the order, namely, the undertaking thoroughly to cleanse the bed and banks of the stream, and held upon the evidence that with regard to the bed the measures which the defendants had taken to cleanse it had been of a perfunctory character and quite insufficient for the purpose, but that with regard to the banks they had done as much as could be reasonably required of them. He continued:—] In my judgment, therefore, the plaintiffs are entitled to have a writ of sequestration issue in respect of this matter also.

I now come to the question what ought actually to be done.

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I think the writ must issue, not in respect of the negative injunction, but in order to put pressure upon the defendants to perform the positive part of the order, namely, their undertaking. What I mean is this—that, if there had been no undertaking, if there had been nothing but the negative injunction, I think it would be sufficient to express the view that the defendants have committed a breach, and, of course, visit them with the costs of the motion, trusting as I do to their honestly endeavouring in the future to perform their obligation. But the matter stands in a different way having regard to the fact that the order contains a positive undertaking, and I think that the proper course to pursue will be to direct the writ of sequestration to issue, but to lie in the office for a period (which can be settled presently), and not to issue at all from the office if within that period the defendants perform their undertaking.

With regard to the costs, in many cases like the present, in two at all events which have been cited to me, the defendants have been ordered to pay the costs as between solicitor and client, that is to say, the Court has been asked to afford the plaintiff an indemnity against the costs of his proceedings in contempt; and that has been done where the sequestration has been suspended as I propose to suspend it in this case. I think I ought, in the exercise of my discretion, to take the same course here. I do not say for a moment that it is a rule of the Court or anything of the kind that in cases of this sort costs ought to be given as between solicitor and client; I think that is a matter within the discretion of the judge. Dealing with the injunction alone, or rather with the contempt in not obeying it, I think, where the Court does not actually direct the writ to issue, though it comes to the conclusion that the contempt has been committed, it is in a sense making a bargain with the defendants—that is to say, it is saving the defendants and the ratepayers from a very considerable pecuniary loss which would be incurred if the writ were actually issued, and it is saving them from that loss on the assumption that the Court having expressed the opinion that their duty has not hitherto been performed, they will do their duty. In a case like that, where less is given to the plaintiff than he is found by the Court to be entitled to, by way of

concession to the defendants, I think it is only fair that the plaintiff should receive a complete indemnity so far as solicitor and client costs will give him one against the expenses of the proceedings. With regard to the sequestration, in a case where the Court directs the writ to issue, but suspends its operation with a view of enabling the defendants to do their duty without the inconvenience of having commissioners actually in possession of their property, I think the same course may properly be pursued, as it has in fact been pursued in the cases mentioned. In my judgment, therefore, the proper order to make is to direct the writ to issue, but to lie in the office for a certain period, and to order the defendants to pay the plaintiffs' costs as between solicitor and client.

[It was ultimately arranged that the writ should lie in the office for six months and should not issue from the office at all if within that period the bed of the river should be properly cleansed to the satisfaction of Mr. E. P. Squarey, of Salisbury, a person agreed upon between the parties.]

Solicitors: *Longbourne, Stevens & Powell, for Jackson & Jackson, Devizes; Robins, Hay, Waters & Hay, for Mann & Rodway, Trowbridge.*

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May 4, 5, 6, 9, 10, 11.

HUNT, ROOPE, TEAGE & CO. *v.* EHRMANN BROTHERS.

[1909 H. 1992.]

Passing off — Essentials to constitute — Trade Description — Necessity for Identification of, by Plaintiff, with definite Class of his Goods.

In order to succeed in a "passing off" action, not based upon an express representation, the plaintiff must prove that the name or the get-up or whatever it may be by which the defendant describes his goods is the recognised description of the plaintiff's goods or of a definite article or class of articles of the plaintiff's goods as and for which the incriminated article or class of articles is being passed off. Further, if the incriminated goods are the goods of the plaintiff himself, i.e., where the defendant is selling certain goods dealt in by the plaintiff as and for other goods dealt in by the plaintiff, it is equally essential that the plaintiff should be able to define the goods for which the incriminated goods are passed off. In order to determine whether the incriminated goods are passed off or not the whole of the description of them must be looked at, and then the well-known and accepted description of the goods as and for which they are passed off must also be looked at, to see whether the description used by the defendant will lead persons to believe that his goods are those which are denoted by the other description and not the goods which they really are.

The plaintiffs, H. R. & Co., were port wine shippers and merchants. The defendants, who were retail wine merchants, issued a price list in which they advertised the plaintiffs' wine as H. R.'s "Grand Old Crusted Port. Over six years in bottle . . . . Usual credit price per doz. 60*s*. Now offered by us at per doz. 34*s*." The plaintiffs sold two distinct classes of port wine, one a superior wine and the other an inferior and cheaper wine. In both cases, with a few exceptions, the wine was sold by them in the cask. The plaintiffs alleged that the defendants were passing off the plaintiffs' inferior wine as and for their superior wine. It was proved that the plaintiffs sold no wine matured in bottle as to which it could be said that it was part of its description that its usual credit price was 60*s*. per dozen:—

Held that, the plaintiffs having no separate and distinct class of wine to which the description "usual credit price per doz. 60*s*." was attached, the description in the defendants' price list was inapplicable to the plaintiffs' superior wine, and therefore there was no passing off by the defendants of the plaintiffs' inferior wine as and for their superior wine.

Witness Action.

Action by the plaintiffs for an injunction to restrain the defendants from publishing certain price lists (hereinafter referred

to as price list No. 735 and price list No. 749) or any other price list, or advertisement, or similar document containing similar statements.

The plaintiffs complained (1.) that certain of the statements in price list No. 735 were defamatory of the plaintiffs in their credit as traders, and (2.) that by means of certain statements in both price lists the defendants were passing off an inferior wine of the plaintiffs as and for their superior wine.

The point as to the alleged passing off is the only part of the case which calls for a report.

The following statement of the facts is taken from the judgment of Warrington J. :—

Messrs. Hunt, Roope & Co. are port wine shippers and merchants. Their firm's business has been carried on for upwards of 150 years. They have a high reputation both with the trade and with the public as shippers of and merchants in wines. They were to some extent growers of wine until the year 1907, when they gave up the vineyards owned by them, but even when they were, to some extent, growers of wine they were only growers to a small extent: the bulk of the wine they shipped and dealt with was produced on vineyards not their own. They are not dealers in bottled wines, that is to say, in wine not vintage wine which is shipped to England in cask, and bottled in England, described as old bottled wine as distinguished from vintage wine. The only bottled wine which they sell is wine which has been matured in wood in their own cellars, drawn off into bottles, and sold without being further kept. Perhaps I had better say this further—the plaintiffs sell two classes of wine; they sell vintage wine and wine which is matured in wood at prices varying from about 50*l.* to somewhat about 60*l.* a pipe. They also sell another kind of wine, not a vintage wine, at prices between 20*l.* and 30*l.* a pipe. The wine in question is wine of the latter class, and, as I will state directly, was sold f. o. b. at Oporto at 22*l.*

The defendants, Messrs. Ehrmann Brothers, really a single person, are retail wine merchants, who advertise very largely, and who profess to sell their wine at much lower prices than the ordinary retail dealer. In fact, they put forward, on what is

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known as their pink list, that they sell at exact lowest wholesale market prices. In the month of June, 1909, they issued with their other trade documents the price list No. 735 complained of. That price list, so far as is material, is in the following terms:— It is headed "The crisis in Portugal. Important special sale of 2921 dozen high class port. Acquired owing to the crisis in Portugal at about half the ordinary shipping prices, and with the object of a quick turn-over re-sold by us at unprecedentedly low prices": that is the introduction. I now come to the statements which are complained of as being defamatory to the plaintiffs in their credit: "Owing to serious conditions—political and commercial—prevailing in Portugal for some time past, forced realizations by growers and holders of large stocks have taken place at an enormous sacrifice. Under these circumstances we have been induced to make extensive purchases (as per particulars below) at about half the usual shipping prices, and, in accordance with our system, are giving our customers the benefit of the extraordinary bargains so secured, as shewn by the prices quoted, at which we advise admirers of the 'King of Wines' to secure substantial quantities. When more normal conditions prevail again, these prices will necessarily be materially increased." Then comes the list of the wines which are so offered. It is in columns. It has certain numbers in one column; then the quantity offered; then the description of the wine; and then, in another column, "Usual credit price per doz.," and in another, "Now offered by us at per doz." The wine in question is entered in that list in these terms: "140 doz. Hunt Roope's Grand Old Crusted Port. Over six years in bottle, fine colour and flavour, fruity, beautifully matured wine. Usual credit price per doz. 60*s*. Now offered by us at per doz. 34*s*." The plaintiffs on seeing that circular complained, and the defendants said in effect that the circular was done with and that it would not be sent out again. But later on a remnant price list headed "Important clearance sale of remnants," No. 749, was issued by the defendants, in which there is contained in the list of ports "9 dozen Hunt, Roope's Grand Old Crusted Port; over six years in bottle; fruity, beautifully matured. Usual credit price per doz. 60*s*. Now offered by us at per doz. 34*s*." On this coming to the

knowledge of the plaintiffs they proceeded with the action, the writ in which had been issued on their finding out about No. 735, but had been kept back, and now the action comes on for trial.

The history of the wine in question is this: It was bought by the London firm of Messrs. Corney & Barrow in the year 1901 at 22*l*. a pipe. It was wine of the year 1899, which was not a vintage year: there were ten pipes. It was bottled by Messrs. Corney & Barrow after blending it with a pipe and a half of other wine of Messrs. Hunt, Roope & Co. It was bottled by them in the year 1902, and was taken into their stock at 16*s*. 6*d*. per dozen. In 1909 it was sold by Messrs. Corney & Barrow at 29*s*. 6*d*. a dozen in bins, less 2½ per cent. discount and less 2 per cent. commission, and they agreed in part payment of the purchase-money to take four pipes of port at 20*l*. a pipe f. o. b. at Oporto. That was the sale of the remaining 224 dozen of the 11½ pipes bought by Messrs. Corney & Barrow. A representative of Messrs. Corney & Barrow who was called as a witness said that in his opinion they did not make a loss over that sale, and certainly it was not a sale by them at an enormous sacrifice. They were, in fact, well satisfied with the transaction. The purchaser was a firm of Messrs. Southard & Co., who are brokers and auctioneers. They bought on January 14, and they put some of the wine up for auction in February, and some in April. The wine in question was bought by the defendants in April partly at the auction, and partly by private contract at a price of 21*s*. per dozen. The wine was, as described in the price list, "old crusted port, over six years in bottle." The defendant, Mr. Ehrmann, told me he tasted the wine, and that he came to the conclusion that it was a good wine, that it was a wine of a vintage character, though not of a vintage year, and he thought that it was a wine which a retail dealer might fairly sell at 60*s*. a dozen, and that 34*s*. a dozen could fairly be regarded as the wholesale price in the year 1909 of the wine originally bought in 1901. Looking, however, to the evidence as a whole, I find that the 34*s*. charged was a fair retail price for this wine, neither too high nor unusually low, and that as to the wine, though it might have been sold at a credit price of 60*s*. by certain people who chose to charge that

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price for it, if it were sold at the credit price of 60*s*., that would be, in my opinion, an exaggerated price.

Cave, K.C., and *Owen Thompson*, for the plaintiffs. The defendants by affixing the description "usual credit price per doz. 60*s*." are passing off the plaintiffs' cheaper wine as and for their dearer wine.

H. Terrell, K.C., *Buckmaster, K.C.*, *D. M. Kerly*, and *J. W. Manning*, for the defendants. In order to succeed in an action for "passing off" the plaintiff must prove that he has some definite article or class of articles which is indicated by the description in question and for which the defendant's goods can be passed off: *Burgoyne & Co., Ld.* v. *Godfree & Co.*(1); *Imperial Tobacco Co. (of Great Britain and Ireland), Ld.* v. *Purnell & Co.*(2)

The plaintiffs do not sell any definite class of wine as to which it can be said that the words "usual credit price per doz. 60*s*." form part of its description. The actual price of the wine must be a matter of opinion. The plaintiffs have never sold any of their wine under the description in the defendants' price list. The defendants are selling this wine under a description which properly describes what it is and no one can complain of their so doing—*Canham* v. *Jones* (3)—and there is nothing with which it can be confused. There is here no passing off inasmuch as there is no definite article of the plaintiffs which the defendants can pass off. [They also referred to *Teacher* v. *Levy*. (4)]

Cave, K.C., in reply. In substance the Court is asked to restrain the defendants from selling the plaintiffs' cheaper wine as and for Hunt, Roope's wine usually sold at 60*s*. a dozen. It is not necessary for the plaintiffs to prove that there is such a thing as Hunt, Roope's 60*s*. port. On the evidence the plaintiffs sell two classes of port, the finer, a vintage wine or wine in the nature of a vintage wine, at about 50*l*. a pipe, the inferior wine at an average price of about 22*l*. a pipe. It is therefore of great importance to them that they should keep up the reputation of the higher priced wine which on the evidence is usually sold at

(1) (1904) 21 Rep. Pat. Cas. 550; 22 Rep. Pat. Cas. 168.
(2) (1904) 21 Rep. Pat. Cas. 598.
(3) (1813) 2 V. & B. 218.
(4) (1905) 23 Rep. Pat. Cas. 117.

about 60*s.* a dozen. The statement that the usual credit price of the wine sold by the defendants is 60*s.* is not a tatement of opinion, but of fact.

WARRINGTON J. The plaintiffs in this case claim an injunction restraining the defendants from publishing two price lists, one of which is conveniently referred to as price list No. 735, and the other as price list No. 749, or any other price list, or advertisement, or similar document containing similar statements.

The grounds on which the plaintiffs seek for an injunction are, in the main, two—first, that the price list No. 735 contains statements which are defamatory of the plaintiffs in their credit as traders ; and, secondly, that the effect of the price list is to make people believe that in buying certain wine of the plaintiffs therein described they are buying a different class of wine of the plaintiffs, namely, wine of a distinct superior quality as compared with one of a distinct inferior quality. In other words, the second ground is that they are passing off the goods which they sell as and for other goods. The facts are these : [His Lordship stated the facts as above set forth, and continued :—]

I think those are the only material facts which I need state before coming to an examination of the plaintiffs' case in reference to the two independent charges they make against the defendants. The first of those charges, the charge of libel, is made in paragraph 8 of the statement of claim. [His Lordship then dealt with this charge and held that the allegation made in that paragraph on which the charge was founded broke down for the reason that none of the statements in the price lists related to or affected the plaintiffs. He continued:—]

I now come to the more difficult part of the case—a good deal more difficult—and that is the charge that the defendants by the statement they make as to the usual credit price are passing off this wine as and for a wine of the plaintiffs of a higher character. If they were in fact passing off bad wine or cheap wine as and for a well-known class of more expensive wine, then I think the plaintiffs would be entitled to their injunction without any proof that to make those statements would injure them. I think that to make persons believe that a cheap wine is wine

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which is sold by a trader at a higher price might induce the purchaser of that cheap wine, or any person who drank it, to say "If that is the wine they sell at that high price, well, I would rather have the cheaper." But the question I have to determine is whether there is here the legal wrong committed by the defendants which we usually describe as "passing off." Before I examine the case, I just want to get rid of one possible suggestion. Reading the statement of claim, I think the pleader was a little bit uncertain whether he intended to found his case upon trade libel, that is to say, on wrongful disparagement of the plaintiffs' goods, or on the ground of passing off, but, whether he did so or not, I may dismiss the case of trade libel at once, because that can only be made actionable on proof of special damage, and no special damage is alleged here. I have, therefore, only to deal with the suggestion that the defendant is passing off one class of goods for another.

Now what is the meaning of what we usually call passing off? The common case is where a trader by express representation, by the use of a trade name, by get-up, or by some similar device, induces persons to buy his goods as and for the goods of somebody else, and necessarily that somebody else must, in order to succeed, prove that the name—unless there is express representation—and the get-up, or whatever it may be by which the defendant seeks to describe his goods, are the proper and accepted description of the plaintiff's goods; otherwise the use of that device cannot become the means of passing off the one for the other. Further, in order to substantiate a case of passing off, there must, in my opinion, be a definite article or class of articles as and for which what I may call the incriminated article is passed off. I think those two propositions are inherent in the doctrine of all the cases relating to passing off. Further, beyond the common case which I have just mentioned, there may be a case—and we have had an example of such a case referred to (1)—where the incriminated goods, as I have called them, are the goods of the plaintiff himself, that is to say, where the defendant is selling certain goods dealt in by the plaintiff as and for certain other goods dealt in by the plaintiff; but, in that case as in the

(1) *Teacher* v. *Levy*, 23 Rep. Pat. Cas. 117.

other, it seems to me equally essential that the plaintiff should be able to define the goods for which the incriminated goods are passed off. Further than that, in order to determine whether the incriminated goods are passed off or not, you must look at the description and the whole of the description of them. You must then look at the well-known and accepted description of those goods as and for which they are passed off, and you must see whether the description used by the defendant will lead persons to believe that his goods are those which are denoted by the other description and not the goods they really are.

Now I come to look at what is alleged in this particular case. The passing off case depends on the price list part of the document rather than on the heading at the top of it. The particular part of it which is complained of is that which I have already read. The defendants purport to sell "Hunt Roope's grand old crusted port. Over six years in bottle; fine colour and flavour; fruity, beautifully matured wine. Usual credit price per doz. 60*s*. Now offered by us at per doz. 34*s*." The plaintiffs' case is this. They say "We have two distinct classes of wine, one of which may be roughly described as a wine of about 50*l*. to 60*l*. per pipe free on board at Oporto, and another wine which may be said to be from 20*l*. to 30*l*. per pipe free on board at Oporto." They say that the wine of the first class is usually sold under, or may properly have applied to it, the description "usual credit price per doz. 60*s*.," and that the other one could not properly have that description affixed to it, and that, by affixing that description to the wine of the cheaper class, which this wine is, persons are led to believe that it is the wine of the dearer class, and that therefore the defendants are passing off an inferior class of goods sold by the plaintiffs as and for a separate and distinct class of goods also sold by them and to their injury. In the first place, I think the plaintiffs have failed to establish that there is a separate and distinct class of wine to which, and to which alone, the description "usual credit price per doz. 60*s*." could be attached. I am not going to be so technical as to say that I mean 60*s*. and 60*s*. only. I mean the price at or about 60*s*. If there is any wine of theirs as to which it could be said that the usual credit price is 60*s*. or thereabouts

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it is a vintage wine or a wine matured in wood. There certainly is no wine of theirs matured in bottle as to which it could be said that it is part of the description that the retail price per dozen is 60*s.* or thereabouts. If that is so, then in my opinion the plaintiffs have failed to prove that which is in my judgment an essential part of the case they set themselves to prove when they charge the defendants with passing off their goods as and for other goods.

But the case does not stop there. Assuming for the moment, though I do not think it is proved, that the plaintiffs have a class of wine to which, as part of its description, the words "usual credit price per doz. 60*s.*" would be appropriate, even then in my judgment the defendants would not by this statement have been passing off this wine as and for that, and for this reason, that if there is any class of wine at all of which that statement as to price is part of the description it is not wine of the class included by the defendants in their price list. The defendants have in their price list "Grand Old Crusted Port. Over six years in bottle," with the rest of the description. No part of that description is applicable to the class of wine which I have for the moment assumed might bear as part of its description the reference to the retail price, because that wine to which, if at all, this description could be applied is either a vintage wine or wine which has matured in the wood in the plaintiffs' own cellars. Then the plaintiffs say, "One thing at all events is true, namely, that this statement as to the usual credit price, if a statement of fact, and we, the plaintiffs, say it is a statement of fact, is untrue with reference to this particular wine." That may be so. If I were driven to say so, I should say that as a statement of fact the statement is untrue. But supposing it is untrue, that does not, as it seems to me, bring the case within the circumstances within which it must be brought if the plaintiffs are to succeed on the ground of passing off. There is considerable doubt as to whether the statement "usual credit price per doz. 60*s.*" is or is not intended to be a statement of fact. I think the natural way of reading this, and the way an ordinary person would probably read it, would be that it is a statement of fact—that is to say that it is a

statement to the effect that, if you go for this wine to an ordinary retail dealer who sells on credit, you will have to pay 60*s.* for it. So far I think it is a statement of fact. But that is not enough. What the plaintiffs have to prove is that, by making that statement with reference to this wine, they lead persons to believe that it is the wine not of this kind sold by the plaintiffs, but of another kind sold by the plaintiffs, and this is why I think the case breaks down. I think the defendants here have so described their wine that it would not be mistaken by a purchaser for the only wine of the plaintiffs as to which it can by any possibility be said that it is wine the usual credit price of which is 60*s.* per dozen. I do not find as a fact that there is such a wine. I do not think it is necessary for me to do so, but I say that, assuming there is such a wine that could be so described, I think the defendants have quite sufficiently distinguished their wine from that which is so described.

On the whole the plaintiffs' action in my opinion fails, and there must be judgment for the defendants with costs.

Solicitors: *Bramall & White; Hyman Isaacs & Lewis.*

W. I. C.

PARKER J. 1910 *April* 22.

CORPORATION OF LONDON *v.* COUNTY OF LONDON ELECTRIC SUPPLY COMPANY.

[1910 L. 602.]

Electric Light—Connecting two Areas of Supply of one Company by Mains—Right to break up Streets and lay Mains outside Company's Areas—Electric Lighting Act, 1882 (45 & 46 *Vict. c.* 56), *ss.* 12, 13—*Electric Lighting (Clauses) Act*, 1899 (62 & 63 *Vict. c.* 19), *Schedule*, *s.* 12—*London Electric Supply Act*, 1908 (8 *Edw.* 7, *c. clxvii.*), *s.* 4.

The defendant company was a company to which the London Electric Supply Act, 1908, applied. The company had one area of supply north of and another south of the Thames and wished to connect the same by mains running through streets outside either area, including London Bridge, a bridge belonging to the Corporation of the City of London as trustees of the Bridge House Estates, and repairable by the Corporation as such trustees and not by any local authority:—

Held, that s. 4, sub-s. 3 (B), of the Act of 1908 gave power to the company to break up the intervening streets and bridge for the purpose of laying therein the connecting mains, subject to the consent either of the Corporation or of the Board of Trade under s. 13 of the Electric Lighting Act, 1882, and s. 12, sub-s. 2, of the schedule to the Electric Lighting (Clauses) Act, 1899.

Sect. 4 of the Act of 1908 explained.

The County of London Electric Supply Company, Limited, was, under the authority of orders made between 1892 and 1900 under and subject to the Electric Lighting Acts, 1882 and 1888, and confirmed by Acts of Parliament, authorized to supply electrical energy within (*a*) an area north of the Thames now forming the metropolitan borough of Finsbury and part of the metropolitan borough of Holborn, and (*b*) an area south of the Thames now forming the metropolitan boroughs of Wandsworth and Camberwell and parts of the boroughs of Battersea, Southwark, and Bermondsey.

The company was within these areas supplying electrical energy from its generating stations in Finsbury and Wandsworth, but was desirous, for the purposes of ensuring stability of supply and economy and further utilizing its generating stations, to connect its two areas, which were separated by the Thames and by the city of London and parts of Southwark and

Bermondsey (in which the company was not authorized to supply electrical energy), by means of mains to be laid through the city of London, across London Bridge, and through Southwark and Bermondsey.

The company on September 14, 1909, sent to the clerk of the Corporation of the City of London a notice stating that after the expiration of a month from service of the notice the company intended, in exercise of the powers conferred by the London Electric Supply Act, 1908, and s. 14 of the schedule to the Electric Lighting (Clauses) Act, 1899, incorporated therewith, to commence the execution of the laying and amending of extra high pressure electric mains and three two-and-a-half inch iron conduits, crossing London Bridge and thence passing by a route shewn on a plan to the boundary of Finsbury.

The Corporation objected to the proposed works, and on October 20, 1909, requested the company to withdraw the notice so far as it related to London Bridge on the ground that it was not a public bridge within the meaning of s. 14 of the schedule to the Act of 1899. The Corporation's contention was that London Bridge was a private bridge, belonging to the Corporation as trustees of the Bridge House Estates, and built, maintained, repaired, policed, lighted, and cleansed at the expense of the estates, and not out of the rates.

The solicitor of the company, in answer to this contention, on November 10, 1909, sent to the City Solicitor a letter enclosing a copy of a memorial, sent that day to the Board of Trade, asking for the Board's written consent authorizing and empowering the company to break up "the said street known as London Bridge" for the purpose of connecting the company's two areas, as provided by s. 13 of the Electric Lighting Act, 1882, incorporated with s. 4 of the London Electric Supply Act, 1908; and on the same day the company gave to the Board of Trade notice of appeal thereto, in accordance with the Act of 1908, to inquire into the matter and approve of the proposed works subject to such amendments or conditions as to the Board might seem fit. The company also applied to the Board, under s. 4, sub-s. 4, of the Act of 1908, for the appointment of an arbitrator to settle the route and the dimensions and position of the trench. Copies of

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the notice of appeal and the application were also sent to the Corporation.

On March 22, 1910, the Corporation commenced an action against the company, claiming a declaration that the company was not entitled under the Acts of 1882, 1899, and 1908, or any of them, or otherwise, to break up, or carry its electric mains over, London Bridge without first obtaining the consent of the Corporation as trustees of the Bridge House Estates; an injunction to restrain the company from so breaking up or laying mains without such consent; a declaration that the company was not entitled (*a*) by virtue of the Act of 1908 to appeal to the Board of Trade against the Corporation's disapproval of or dissent to the laying of mains over the bridge, or (*b*) by virtue of s. 13 of the Act of 1882 to apply to the Board for or obtain from it an effectual consent to the breaking up of the bridge for laying the mains without the corporation's consent; and an injunction restraining the company from proceeding with any arbitration or inquiry in relation to the appeal and application to the Board purporting to have been made by the company under the Acts of 1908 and 1882.

The Corporation on April 22, 1910, moved for the injunction.

A. J. Walter, K.C., and *C. Lyttelton Chubb*, for the Corporation. London Bridge is not within either of the company's areas of supply, and it is not repairable by any local authority, but is the private property of and repairable by the Corporation as trustees of the Bridge House Estates. Before the passing of the London Electric Supply Act, 1908 (8 Edw. 7, c. clxvii.), the company could not have done what it now proposes to do, and the question is whether that Act has extended the company's powers in this respect. Reading s. 4 of the Act with the enactments incorporated therein by reference, it is submitted that the company has not the powers claimed for it, and that special powers are required to justify the proposed action of the company. [They also referred to the definition of "street" in s. 32 of the Act of 1882.]

Balfour Browne, K.C., and *Tyldesley Jones*, for the company. The Act of 1908 was intended to give this and other companies

extended powers. The Act is intituled "An Act to confer further powers and to make further provision with respect to the supply of electrical energy in London," and this intention is further shewn by the preamble to the Act. Suppose the Act of 1908 had not been passed, but London Bridge had been within an area of supply of the company, in that case the company could have broken up the bridge for the laying of mains with the consent either of the Corporation or of the Board of Trade. Sect. 12 of the Electric Lighting Act, 1882 (45 & 46 Vict. c. 56), incorporates the provisions of the Gasworks Clauses Act, 1847 (10 & 11 Vict. c. 15), with respect to breaking up streets for the purpose of laying pipes, and s. 6 of the Act of 1847 enables undertakers to break up streets and bridges within the limits of their special Acts for the purpose of laying down pipes. But s. 13 of the Act of 1882 provides that nothing in that Act or in any Act incorporated therewith is to authorize undertakers to break up a street which is not repairable by the local authority without the consent of the authority, company, or person by whom the street is repairable "unless in pursuance of special powers" "or with the written consent of the Board of Trade," which special power or consent is not to be given until notice has been given to such authority, company, or person, and also an opportunity to state any objections they may have thereto.

Sect. 4, sub-s. 2, of the Act of 1908 gives power to a company to connect any two or more areas of its supply by mains. One of those areas may be separated from another, in which case the connecting mains must be placed in land outside any area of supply of the company, and where that is the case s. 4, sub-s. 3 (B), applies and incorporates, amongst other provisions, ss. 12 and 13 of the Act of 1882. The Corporation's view cannot be taken without striking out s. 4, sub-s. 3 (B), of the Act of 1908. "Street" has only the definition given in s. 32 of the Act of 1882 when the context does not otherwise require.

A. J. Walter, K.C., in reply.

[Reference was also made to the Gasworks Clauses Act, 1847, s. 7, and the Electric Lighting (Clauses) Act, 1899 (62 & 63 Vict. c. 19), s. 12, sub-s. 2, s. 14, sub-s. 1 of the schedule, and ss. 2 and 4, sub-ss. 1, 2, and 4, of the Act of 1908.]

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PARKER J. The question to be determined on this motion is really a question of construction arising under s. 4 of the London Electric Supply Act, 1908. Now that is an Act which is designed to confer further powers upon the London electric supply companies named in the schedule to the Act, of which the defendants to the present action are one. As appears from the preamble, the existing state of affairs which the Act was intended to remedy was this. There were in London a number of electric supply companies having no power to enter into arrangements with each other. Further, there might be a company with two areas of supply but without power to make any connection between the two areas. This did not lead to economy in the working of the several undertakings, and the want of economy in the working might increase the price of the supply to the public. Sect. 4 of the Act makes provision respecting an authorized undertaker or specified company—I need not deal with the specified company—but the authorized undertaker as so defined is to include the companies I have referred to, and in particular the defendant company. Sub-s. 1 of s. 4 provides that "An authorised undertaker or a specified company for the purpose of carrying into effect any agreement for the giving or taking of a supply of electrical energy may by means of electric mains make a connection between the generating station or area of supply of one authorised undertaker or specified company party to the agreement and the generating station or area of supply of any other authorised undertaker or specified company party to the agreement." By sub-s. 2 "An authorised undertaker or a specified company may also by means of electric mains make a connection between any two or more areas which that authorised undertaker or specified company is authorised to supply or between any such area and a generating station of that authorised undertaker or specified company." The first of these two sub-sections relates to there being two undertakers and there being an agreement for a connection between them; and the second sub-section relates to there being two areas in the hands of one company, and that one company desiring to make a connection between those two areas or between one of them and the generating station that supplies it or the other. Now it is obvious that under the earlier Acts,

where there were separate undertakers without any power to make agreements with each other or separate undertakings in the hands of one company without power to make connections between them, the powers of each company were confined to a particular undertaking and area. The moment you get power to make working agreements between one company and another, or to make a connection between one area and another, you want powers which extend outside the area of any particular company or undertaking, and for that purpose we have sub-s. 3, which commences as follows: "In relation to any such electric mains as aforesaid"—that is, mains laid for the purpose of the preceding two sub-sections—"the authorised undertaker or specified company—(A) With respect to streets in any area which they are authorised to supply shall have the powers and be subject to the provisions of the Acts and orders relating to their powers of supply in that area." Now I think that clause was wanted for this reason, that the powers conferred by the Legislature of breaking up streets are conferred for defined and definite purposes, and for those purposes only; and no existing undertaker would have the right to break up the streets for anything which is outside the purview of the existing undertaking. This extends that purview to something outside what was originally contemplated. Therefore you want extended powers, and those powers are given in connection with mains laid for new purposes by enabling the undertakers to exercise for new purposes, with regard to streets within the area, the powers which they already have for existing purposes. Then comes clause (B): "With respect to streets not within any area which they are authorised to supply shall have the powers and be subject to the provisions of the Electric Lighting Act, 1882, and of sections 10 to 20, 60 to 62, 69 to 73, 76, 77 and 79 to 82 of the schedule to the Electric Lighting (Clauses) Act, 1899, and those provisions so far as applicable but subject to the provisions of this section shall be incorporated with this Act and shall have effect and the authorised undertaker or specified company laying the mains shall be deemed to be the undertakers." Again, that sub-section confers powers which did not exist before, and powers to be exercised outside the existing limits of supply.

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Now, when you come to look into the powers to which reference is made, I think the criticism is more or less true that they are powers which are only given for the purposes of the original undertaking—if I may use that expression—and do not extend to streets outside the district. But the only possible way of making sense of the section appears to be this—that the undertakers are to have as regards streets outside their areas of supply the same powers as are already conferred on them by the sections of the Acts referred to with regard to streets inside those areas. When we come to look at these particular sections we find that by the Act of 1882 there is a section—s. 12—which confers on the undertakers the powers with regard to breaking up streets which are conferred on the undertakers under the Gasworks Clauses Act, 1847, those powers being limited to their limits of supply, whatever that means—I need not go into that—and then s. 13 has a proviso which limits the operation of the general powers conferred by s. 12. That is to say, s. 13 means this: Notwithstanding the general powers conferred by s. 12, "nothing in this Act or in any Act incorporated therewith shall authorise or empower the undertakers to break up any street which is not repairable by such local authority, or any railway or tramway, without the consent of the authority, company, or person by whom such street, railway, or tramway is repairable, unless in pursuance of special powers in that behalf inserted in the license, order, or special Act, or with the written consent of the Board of Trade, and the Board of Trade shal not in any case insert any such special powers in any license or provisional order, or give any such consent until notice has been given to such authority, company, or person by advertisement or otherwise, as the Board of Trade may direct, and an opportunity has been given to such authority, company, or person to state any objections they may have thereto." It appears to me, therefore, that with regard to streets which are not vested in the local authority the provisions and limitations of s. 13 apply, and such a street cannot be broken up without the consent of the person who is responsible for the repair of it, or, if that consent is withheld, without the written consent of the Board of Trade after giving the person entitled the opportunity of being heard. Similarly,

when you come to the other sections which are incorporated, namely, ss. 10 to 20 of the Electric Lighting (Clauses) Act, 1899, you find similar provisions; for instance, there is a provision in s. 12, sub-s. 2, which provides that "Nothing in the special order shall authorise or empower the undertakers to break up or interfere with any street or part of a street not repairable by the local authority or any railway or tramway, except such street, railways or tramways (if any), or such parts thereof, as they are specially authorised to break up by the special order, without the consent of the authority, company, or person by whom that street, railway, or tramway is repairable, or of the Board of Trade under section 13 of the Electric Lighting Act, 1882 . . . ."

Therefore it appears to me the result of s. 4, sub-s. 3 (B), of the Act of 1908 is to confer upon the defendants in this case a power to connect the undertaking which they hold north of the river with the undertaking south of it, and for that purpose to break up streets outside either of those areas of supply. The defendants are desirous of carrying their mains across London Bridge. London Bridge on the evidence before me—I need not go into it, but I will assume for the purpose of this decision—is not a bridge repairable by the local authority, but it is a bridge repairable by the Corporation as trustees of a certain definite trust, and, that being the case, it comes within the limitations of s. 13 of the Act of 1882 and s. 12, sub-s. 2, of the schedule to the Electric Lighting (Clauses) Act, 1899. Without the consent of the Corporation or the consent of the Board of Trade, obtained as in those sections provided, it cannot be broken up. I think the section does authorize its breaking up subject to one or other of these consents being obtained. It appears to me that if I were to hold otherwise I might practically render the Act of 1908 inoperative, because no authorized undertaker would have any power under sub-s. 3 of s. 4 to break up any street at all outside its area. That is a result which cannot have been contemplated, because the Act is one for conferring powers for that very purpose on the supply companies which are referred to in the schedule. Therefore, in my opinion, according to the true construction of this sub-section, the power of breaking up streets

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extends to London Bridge, though London Bridge is outside the areas of the defendants' undertakings.

I do not think that in this case I ought to grant an injunction. I will make a declaration and leave the parties to proceed further with the matter if necessary. With regard to the form of the declaration, that will require some little care. I think it ought to be this: Declare that according to the true construction of sub-s. 3 (B) of s. 4 of the Act of 1908 the defendant company have power, subject to the provisions of the Act and the sections scheduled to the Acts therein referred to, to break up streets outside their area, including London Bridge.

Solicitor for plaintiffs: *The City Solicitor.*
Solicitor for defendants: *Sydney Morse.*

F. E.

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[1910 W. 394.]

Power—Execution—Power to appoint up to a limited Amount—General Power—Exclusion from Benefit thereunder of Person disputing Will—Charge—Overriding Power to appoint Mixed Fund—Wills Act, 1837 (1 *Vict. c.* 26), *s.* 27.

W. by his will gave his real and personal estate to trustees in trust to permit his wife to receive the income during her life, and directed that she should have power by her will to appoint that the trustees of his will should on her death raise and set apart out of his estate and effects enough money to produce the sum of 2*l.* 10*s.* per week, and that she should have absolute power by her will to dispose of that sum when raised and the income thereof as she might think fit, expressing by his will a wish that she should be able, if she desired, to direct the payment of the 2*l.* 10*s.* per week to his son J. during his life, but that, if she should not think fit to exercise the power in favour of J., she should have full power to dispose of the sum so raised and the income thereof in such manner as she might in her uncontrolled discretion think best. "Subject as aforesaid" W. gave his estate and effects in trust, after his wife's death, in favour of his children. A power of sale was given by W.'s will, whereby it was also declared that any of W.'s children who should call in question his will should be deprived of all interest thereunder, and

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that if J. should do so, testator's wife should not be able to exercise the power to appoint in his favour.

J. died before the wife, who by her will gave all the residue of her real and personal estate not thereby otherwise disposed of upon certain trusts :—

Held, (1.) that a charge on the testator's residuary real and personal estate for any sum which his wife might appoint under the power was created by the words "subject as aforesaid"; (2.) that, notwithstanding the words as to the children calling in question the will, she had in the events which happened a general power of appointment in respect of the sum which might be raised; (3.) that, although there was no trust for conversion, the power was an overriding one to appoint a fund of mixed realty and personalty, and (4.) that, by virtue of s. 27 of the Wills Act, 1837, the power was exercised by the residuary gift in the wife's will.

In re Jones, (1886) 34 Ch. D. 65, followed.

In re Salvin, [1906] 2 Ch. 459, distinguished.

THOMAS WILKINSON by his will, dated December 20, 1893, appointed his wife, Ellen Wilkinson, his daughter Mary, and his son Arthur trustees and executors thereof, and (after making a specific bequest) gave, devised, and bequeathed all his real and residuary personal estate to the trustees on trust to permit and suffer his wife to receive the income during her life for her sole and separate use and benefit. And he declared and directed that she should have power by her will "to appoint that the trustees or trustee for the time being of my will shall, upon her death, raise and set apart out of my estate and effects such a sum of money as will produce the sum of two pounds ten shillings per week, and my said wife shall have absolute power by her will to dispose of the said sum when raised and the income thereof as she may think fit, it being my wish that she shall be able, if she considers it desirable so to do, to direct the payment to my son James of the sum of two pounds ten shillings per week during his life or until he shall sell assign charge mortgage or dispose of the same or attempt so to do or until by process of law, bankruptcy or otherwise the same would but for this stipulation vest in or become payable to some other person than my said son James, but if my wife shall not think fit to exercise the power of appointment hereby given in favour of my said son James, or in case she shall exercise the same, then after the death of my said son or the happening of any or

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either of the events before mentioned . . . . my said wife shall have full power to dispose of the said sum so raised and the income thereof in such manner as she may in her uncontrolled discretion think best. And subject as aforesaid I declare and direct that from and after the death of my said wife the trustees or trustee for the time being of my will shall stand possessed of my estate and effects upon trust for my four daughters Mary, Eliza Ellen, Emily, and Edith, and my son Arthur equally and absolutely as tenants in common." And the testator thereby authorized his trustees or trustee to allow his estate to remain in its present state of investment and gave them power as and when they should think it desirable to call in, sell, and convert into money all or any part of his estate and effects. And he declared that if "either of my children shall call in question my will or the provisions herein contained or commence any litigation relative thereto the one or more of them so doing shall thereupon be deprived of all interest under my will and my estate shall be divided between the others or other of them as if the offender or offenders had not been named herein and if my son James shall do so my said wife shall not have power to exercise the power of appointment in his favour hereby given to her."

The testator died in 1894, leaving his wife and all the children named in the will surviving him, but James died in Mrs. Wilkinson's lifetime.

By her will, dated May 28, 1904, Mrs. Wilkinson gave specific and pecuniary legacies and devised and bequeathed "all the residue of my real and personal estate not hereby otherwise disposed of" to the trustees therein named on trust for sale and conversion and to hold the net proceeds on trust as to one moiety for her daughter Mary and as to the other for her son Arthur for life and on his death for his children, and in default of such children on trust for the testatrix's other children. Mrs. Wilkinson died on June 2, 1909, and an originating summons was taken out by one of the executors and trustees of her will for a declaration that on the construction of the will of Thomas Wilkinson and in the events that had happened she had at the time of her death a power to appoint by will in any manner she might think

proper a sum of money sufficient by the income thereof to produce 2*l.* 10*s.* per week in perpetuity, and that this power was validly exercised by the residuary devise and bequest in her will. The defendants were Arthur Wilkinson and Mary Wilkinson, who were joined as executors and trustees of the will of Thomas Wilkinson and not as beneficiaries thereunder. Arthur had no children.

T. G. Spyers (*Ribton* with him), for the plaintiff. At the time of the widow's death James was dead, and as she could then appoint to any one she liked she had a general power. This general power was, having regard to s. 27 of the Wills Act, 1837, exercised by the widow making a residuary gift by her will. The case is within the judgment of Kay J. in *In re Jones.* (1) It is immaterial that there is in this case no trust for conversion. There is power to appoint part of a residue comprising real and personal estate in any manner the widow may think proper and one which might be exercised by appointing any sum not exceeding that which would produce 2*l.* 10*s.* per week; and a power like that is exercised by a general devise and bequest by the donee of the power. It was not necessary for the widow to charge the money on the property. *In re Salvin* (2) is distinguishable, as there the decision was that the general bequest had not the double effect under s. 27 of the Wills Act of creating a fund by charging property under a power given by another instrument, and appointing the fund when created.

J. M. Stone, for Arthur Wilkinson. James was excluded from being an object of the power if he disputed his father's will, and the other children were similarly excluded in a like event, and therefore the widow had no general power of appointment. If she had a general power, it was not, at any rate, as regards real estate. *In re Salvin* (2) shews that the ground of the decision in *In re Jones* (3) was the existence of a trust for conversion which made the whole property one personal fund. There is no trust for conversion here, and the widow's will does not do what

(1) 34 Ch. D. 65, 68. (2) [1906] 2 Ch. 459.
(3) 34 Ch. D. 65.

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In re Salvin (1) shews to be necessary, that is to say, create the charge and then dispose of the money charged.

M. Beebee, for Mary Wilkinson. The testator gave his trustees a power of sale which is in a case like this as effective as a trust for conversion. The words "subject as aforesaid" created a charge on the property, so there was no need for the widow to create any charge. The charge having created a fund, the residuary gift operated on that under s. 27 of the Wills Act, 1837. Moreover, the power of appointment given to the widow was an overriding power, which preceded all trusts in favour of beneficiaries: see *In re Salvin*. (2) The power in *In re Jones* (3) was of the same nature, and that case governs the present. [He also referred to *Clifford* v. *Clifford* (4); Sugden on Powers, 8th ed. p. 304,]

PARKER J. read the material portions of Thomas Wilkinson's will, and continued as follows: In my opinion the words "subject as aforesaid" create a charge on the residuary real and personal estate for any sum which the widow may appoint under the power. After a direction that the daughters' shares were to be for their sole and separate use, and after giving the trustees a power of sale, the testator declared that if any of his children should call in question his will or commence any litigation concerning it, those doing so should be deprived of all interest under the will and the estate should be divided among the other children as if the offender or offenders had not been named therein, and that if his son James should so offend, the widow should have no power to appoint to him. That apparently would preclude the widow from exercising the power in favour of James in certain events, and it might therefore be argued that it prevented the power from being a general power within the meaning of s. 27 of the Wills Act, 1837; but James predeceased the widow, and at her death she therefore had power, on the construction which I place on the will, to appoint as she thought fit, there being no one excluded from the number of possible appointees. It is suggested that the provision depriving the

(1) [1906] 2 Ch. 459.
(2) [1906] 2 Ch. 466.
(3) 34 Ch. D. 65.
(4) (1852) 9 Hare, 675.

other children of their interests under the will if they disputed it would preclude an appointment to them; but as I read the will, having regard especially to the particular provision as to James, I think that the widow had power to appoint to the other children, and therefore on the construction of the will she had, in my opinion, at her death a general power enabling her to appoint the sum raised in any way she might think fit. Then she by her will, dated May 28, 1904, after making certain specific bequests and pecuniary legacies, devised and bequeathed all her residuary real and personal estate not thereinbefore disposed of to trustees on trust for sale and conversion and out of the proceeds to pay her debts, funeral and testamentary expenses and legacies, and to stand possessed of the residuary trust moneys on the trusts therein declared. The question is whether that gift operated to exercise the power within s. 27. Two authorities have been quoted, and the real question is which of them governs this case. One of these is *In re Jones.* (1) There a testator devised and bequeathed all his real and personal estate on trust for sale and conversion and to hold the trust funds on trusts for his only child and her children and remoter issue; but he declared that notwithstanding this trust his wife might by will or codicil appoint that "any sum or sums of money not exceeding altogether the sum of 20,000*l.* shall after her decease be raised and paid or applied to or for the benefit of such person or persons, for such purposes, and upon such conditions, and with such restrictions as my said wife shall think fit." The wife made a will containing the following devise and bequest:—"I devise and bequeath all my estate and effects real and personal which I may die possessed of or entitled to unto my daughter Harriet Rowland Greene absolutely for her sole and separate use." The question was whether that devise and bequest operated as an exercise of the power. Kay J. held that it did. He considered that the case was covered by s. 27. He says: "I pause there to observe that the power conferred by the will of John Jones was practically a power to appoint part of a residue comprising real and personal estate, in any manner that Mrs. Jones might think proper, and one which might be exercised by

(1) 34 Ch. D. 65, 68.

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her simply appointing 10,000*l.* or 20,000*l.*, as the case might be, to A. B., a stranger." Those words, though not quite applicable to the case of *In re Jones* (1), since there was a trust for conversion, are precisely applicable to the present case. Here we have real and personal estate, and a power—almost in the same words as that in *In re Jones* (1)—to appoint that a certain sum should be raised and paid as the donee of the power thinks fit. It is therefore plain, in my opinion, that Kay J. did not lay any particular stress on the trust for sale and conversion in the will before him. The other authority is *In re Salvin.* (2) In that case there was a settlement of real estate containing limitations in tail male and otherwise as is usual in settlements of realty, and a proviso that it should be lawful for Bryan John Francis Salvin, in certain events mentioned, by deed or will to charge all or any part of the settled property with the payment to himself or any other person or persons at such times and for such purposes and in such manner in all respects as he should think proper of any sum or sums of money not exceeding in the whole the sum of 6000*l.*, and to appoint the premises so to be charged to any person or persons for any term of years on trusts for raising the money charged. B. J. F. Salvin by his will gave all his real property to the tenant for life of the settled property, and all the rest of his personal property among the children of his four sisters equally. Buckley J. decided that the will did not operate, by virtue of s. 27, to charge the property or dispose beneficially of the sum charged. He says regarding s. 27 (3) that it is "divided into two parts, the first relating to real estate and the second to personal estate. A general devise of real estate is to be construed to include any real estate which the testator has power to appoint in any manner he may think proper, and a bequest of personal estate is to be construed to include any personal estate which he has power to appoint in any manner he may think proper. I am unable to find here any words which provide that, where there is a power to charge upon real estate a sum which when charged will be personal estate, general words of gift are to be

(1) 34 Ch. D. 65, 68. (2) [1906] 2 Ch. 459.
(3) [1906] 2 Ch. 464, 465, 466.

construed as effecting, first, the creation of the personal estate by charging it on the real estate, and, secondly, the bequest of the personal estate thus created." He proceeds to quote from *In re Wallinger's Estate* (1) a passage in the judgment of FitzGibbon L.J. to the same effect as what he himself has already said in the passage which I have read. He then proceeds: "To charge the money upon the real estate is one thing, to appoint the money when so charged is another. At the date of the death of Bryan Salvin there was no sum of 6000*l.* or any other amount in existence. The contention is that the general bequest has a double effect—viz., first, that of creating the fund; and, secondly, that of appointing it when created. I do not find anything in the Act which gives to the general bequest this effect." He says, further, "There is, however, an authority in this Court, a decision of Kay J., by which, if I thought it applicable, I should consider myself bound, viz., *In re Jones.* (2) I think it distinguishable . . . . The trust for conversion made the whole property one personal fund, and Kay J. held that the power in the will was practically a power to appoint part of a residuary fund. There was no question there, as there is here, of creating out of real estate a sum of money which, when created, would be subject to a power of appointment. The fund existed as a personal fund, and the learned judge considered that the power was simply a power to appoint part of it. The word 'raise' there was not used in any way in the same sense or with the same result as the word 'charge' is used here. The word 'raise' simply meant that to pay money some part of the investments which were already personal estate would have to be sold. The word 'charge' here means the creation of the personal fund by charging the real estate with it. Further, as regards the argument arising upon the cases which relate to a power of revocation and new appointment, it is noticeable that the language in *In re Jones* (2) was that, 'notwithstanding the trusts hereinbefore declared,' the wife might appoint. In other words, the power of appointment stood in exactly the same position as if it had stood first in the will as an overriding power preceding all trusts in favour of

(1) [1898] 1 I. R. 139, 148. (2) 34 Ch. D. 65.

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beneficiaries. In such case no question of revocation could arise. Upon both these grounds I think that the present case is not governed by *In re Jones*." (1) It is to be observed that in explaining *In re Jones* (1) Buckley J. refers in particular to the trust for conversion, whereas Kay J. himself had not laid any particular stress on that. At the same time he distinguishes the cases relating to questions of revocation and new appointment by pointing out certain passages in the will creating the power which indicated that there was to be an overriding power of appointment, and that the beneficiaries under the will took only subject to that power if exercised. In the present case we have that circumstance. In my opinion there is, on the true construction of Thomas Wilkinson's will, an overriding power of appointment over the residue, consisting of realty and personalty, up to a sum producing 2*l.* 10*s.* per week, and it is only subject to that power and to the sum appointed by it that those in remainder or reversion take any interests at all. Therefore, if that sum is appointed, I think that it is charged by the will creating the power, and there is no necessity to exercise a substantive power to charge. The only question, therefore, is whether the absence of a trust for conversion in the present case is sufficient to distinguish it from *In re Jones* (1) and bring it within *In re Salvin*. (2) In my opinion it is not, and I think that the present case is really within Kay J.'s words in *In re Jones*. (1) There is an overriding power to appoint a fund of mixed realty and personalty, and in my opinion the power has been exercised, as in *In re Jones* (1), by virtue of the residuary gift in the donee's will; and the charge on the realty—since there was realty—is created not by virtue of a power to create a charge, but by virtue of the will conferring the power. Sect. 27 therefore applies, and the power has been duly exercised.

Solicitors: *Rye & Eyre; Champions, Hart, Reade & Co.*

(1) 34 Ch. D. 65.

(2) [1906] 2 Ch. 459.

F. E.

In re ALEXANDER'S SETTLEMENT. JENNINGS *v.* ALEXANDER.

PARKER J.

1910

June 2.

[1908 A. 442.]

Settlement—Construction—Mistake of Fact—Misdescription—Clerical Error—Tail Male instead of Tail General.

By a marriage settlement made in 1886 it was provided that if the eldest son of the settlor should become entitled to W. Montgomery's real estate under his will for an estate in tail male he should be excluded from all share in the trust funds subject to the settlement. E. M. Alexander was the settlor's eldest son, and under the limitations of the will of W. Montgomery, who died in 1868, he became entitled to the testator's real estate for an estate in tail general. The trustees of the settlement took out a summons to determine whether he had lost his right to a share in the settlement funds:—

Held, that inasmuch as the intention of the settlor was clear and at the date of the settlement she must have known that if E. M. Alexander came into the testator's real estate it must be for an estate in tail general, not an estate in tail male, the insertion of the word "male" in the settlement must be treated as a misdescription, and the settlement construed as if the word were omitted; and that E. M. Alexander was excluded from sharing in the settlement moneys, without prejudice to his claims if the younger son died.

By his will, dated March 8, 1862, William Montgomery devised his real estate to Robert Montgomery for life with remainder to Francis Montgomery, the son of Robert Montgomery, for life, with remainder to the first and every other son of the body of Francis Montgomery successively and in remainder as every of them should be in seniority of age and the several and respective heirs male of the body of every such son, the elder of such sons and the heirs male of his body being always to take before the younger of such sons and the heirs male of his body . . . . with remainder to the first and every other daughter of Francis Montgomery successively and in remainder as every of them should be in seniority of age and of the several and respective heirs of the body of every such daughter, the elder of such daughters and the heirs of her body being always to take before the younger of such daughters and the heirs of her body, with divers remainders over; and the testator

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expressly declared that if any person or persons to whom by virtue of the limitations aforesaid an estate tail was given should be living or en ventre sa mère at the time of his decease, then the estate tail so devised should be revoked and in lieu thereof "I do hereby give the hereditaments comprised in such estates tail to the use of the person or persons who would have taken an estate tail or estates tail under the limitations aforesaid during his or their life or lives, without impeachment of waste, with remainder to the use of his or her or their first and other sons or first and other daughters or children or child as the case may be according to the previous limitations to his her or their respective issue successively and in remainder in tail general and where cross remainders are previously limited with cross remainders between them and their issue."

The testator died in September, 1868. Robert and Francis Montgomery died in or before 1898, and in that year Amy Frances Jane Alexander (the elder daughter of Francis Montgomery and the wife of E. D. Alexander, since deceased), who was born during the lifetime of the testator, became entitled to an estate for life in his real estate with remainder to her sons in tail general.

On August 5, 1886, a settlement was executed on the marriage of Mr. and Mrs. Alexander whereby funds belonging to Mrs. Alexander were settled upon certain trusts. Clauses 2 and 3 of the settlement were as follows :—

2. "The trustees shall during the life of the said Amy Frances Jane Montgomery pay to her the income of the trust funds and so that during her coverture the same shall be for her sole and separate use and she shall not have power to dispose thereof in the way of anticipation and after her decease shall stand possessed of the trust funds In trust for such person or persons as the said " A. F. J. Montgomery should appoint, and in default of appointment "In trust for all the children of the said A. F. J. Montgomery either by her said intended or any future husband (except a son or sons excluded by article 3 in the event therein mentioned) who being a son or sons shall attain the age of twenty-one years or being a daughter or daughters shall attain that age or marry under that age in equal

shares and if there shall be but one such child then the whole to be in trust for such one child." . . . .

3. "The first born or only son of the said A. F. J. Montgomery and also every other son (if any) and also the first born daughter of the said intended marriage and also every other daughter (if any) who when he or she attains the age of twenty-one years shall be entitled under the will of William Montgomery of Milton in the county of Northampton Esquire to the hereditaments thereby settled for an estate in tail male in possession or remainder immediately expectant on the decease of the said A. F. J. Montgomery shall be excluded from all share in the trust funds hereby settled if there shall be any other child or children of the said intended marriage who being a son or sons shall attain the age of twenty-one years or being a daughter or daughters shall attain that age or marry but not otherwise."

Mrs. Alexander died in 1902 intestate and without having exercised the power of appointment given to her by clause 2 of the settlement. There were three children of the marriage, a daughter who died young and two sons, of whom the eldest, Edward Montgomery Alexander, had become entitled under the limitations of the will to the testator's real estate for an estate in tail general, and had recently attained twenty-one.

This originating summons was taken out by the trustees of the settlement to determine the question whether E. M. Alexander had forfeited, or in the event of his brother attaining twenty-one would forfeit, the right to share in the settlement funds.

Hartree, for the plaintiffs.

J. M. Gover, for the eldest son. Clause 3 of the settlement must be strictly construed. The settlor has used technical terms; there is no ambiguity in the clause and the Court cannot go behind its provisions. E. M. Alexander is not excluded from a share in the settlement funds, for he has not become entitled to the testator's property for an estate in tail male. We admit that it never was possible for him to take such an estate, but that is immaterial. An estate in tail general is different in degree and in kind from an estate in tail male.

H. Greenwood, for the younger son. The insertion of the word

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"male" is only a clerical error and it should be disregarded. E. M. Alexander has taken an estate in tail and he cannot participate in the settlement funds. When the settlement was made the settlor knew the limitations of the will, and the Court will not assume that the parties intended to provide for exclusion in an impossible event and that clause 3 is therefore a nullity, but will endeavour to give a reasonable effect to it. A mistake is not improbable, for the settlement is carelessly drawn and clauses 2 and 3 are somewhat inconsistent; clause 2 excludes sons only, whereas clause 3 also refers to daughters. The Court has power to read the clause as if the word "male" were omitted and correct the mistake as a mere matter of construction: Kerr on Fraud and Mistake, 4th ed. p. 492. Even if the word "male" is retained the eldest son is excluded, for he has taken an estate in tail general, and that is greater than and includes an estate in tail male. The fact that he has got more than an estate in tail male does not save him from being excluded.

J. M. Gover in reply.

PARKER J. This is a question which arises on a settlement of August 5, 1886, and it is material for the purposes of construction to consider the facts as they existed at that time. Mrs. Alexander was the settlor, and under the will of Mr. Montgomery certain estates were at that date settled on limitations under which she and her children had a possible interest. The estates were in fact settled by the will on Robert Montgomery for life, with remainder to Francis Montgomery for life, with remainder in the events which happened on limitations under which Mrs. Alexander was entitled to a life interest with remainder to her first and other sons in tail general. In these circumstances she made the settlement and settled certain property on the trusts declared in clauses 2 and 3. [His Lordship read them.] The obvious comment is that the settlement is inaccurately drawn because clause 3 purports to exclude both sons and daughters, whereas clause 2 only refers to sons. The difficulty arises in this way: there is an eldest son of the settlor; she is dead, and he has become entitled to an estate in tail general under the will and not in tail male; and it is argued

that inasmuch as he is entitled in tail general and not in tail male he is not excluded from sharing in the settlement funds. If the circumstances when the settlement was executed are considered one of two things must have happened. Either the draftsman perpetrated a joke by putting in an impossible event or it is a blunder on his part. I am not going to assume that it was the intention of the parties to make an impossible provision. I am going to treat the use of the word "male" simply as a misdescription and construe the settlement in that way without any rectification. The intention was that if a son took an estate in tail under the will he should be excluded from the benefits of the settlement, and I hold that the eldest son is excluded, without prejudice to any claim he may have if his brother dies.

Solicitors: *Meredith, Mills & Clark, for G. W. Jennings, Bishop Auckland; Davenport, Cunliffe & Blake, for Wilsons, Ornsby & Cadle, Durham; Samuel Price & Sons, for Markhams, Northampton.*

H. C. R.

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June 2.

In re LOOM.

FULFORD *v.* REVERSIONARY INTEREST SOCIETY, LIMITED.

[1909 L. 2658.]

Will—Gift of Leasehold House, the Legatee performing the Conditions of the Lease—Independent Gift to same Legatee of Dividends on Stock—Acceptance of Legacies—Mortgage of House and Dividends in one Mortgage—Foreclosure—Disclaimer by Mortgagee of all Interest in House—Liability for Repairs to House—Ownership of Dividends.

The testator devised a leasehold house to Marian Ross for life, she paying the rent and performing the covenants of the lease; he also left her the dividends of certain stocks for life. By the lease the testator had covenanted to keep the house in repair. Marian Ross accepted the legacies and mortgaged her interests under the will to the defendant society in one mortgage. The society obtained an order for foreclosure but did not take possession of the house. Marian Ross was now a pauper lunatic. The trustees paid the fire insurance premiums on the house and the rent out of the dividends on the stock and handed over the balance to the society. The lessor claimed possession of the house on the ground of breach of covenants to repair it. The society disclaimed all interest in the house and declined to do the repairs although they claimed to be entitled to the dividends on the stocks. On a summons to determine whether they were liable to do the repairs:—

Held, that on accepting the legacies Marian Ross became personally liable to perform the covenants of the lease; that the society had done nothing to make themselves liable to do the repairs; that the gifts in the will were independent; and that the society were entitled to retain the dividends on the stocks without being liable under the lease.

John Loom by his will, dated October 15, 1891, directed that his debts and funeral and testamentary expenses should be paid out of his residue and (inter alia) devised to his housekeeper, Marian Ross, spinster, the house 335, Queen's Road, Peckham, in which he then resided, for her life, she paying the ground rent and performing all the covenants and conditions contained in the lease thereof and keeping the same fully insured against fire, and at her death the testator directed his executors to sell the house as they should think fit and to hold the proceeds as part of his residuary estate. He also gave to Marian Ross a pony and chaise and the furniture and effects in the house, and also

the dividends arising from time to time from his City of London Brewery shares and stock for her life, and empowered her by will to give the shares and stock to such person or persons and in such manner as she should think proper. The testator directed his executors to divide all the residue of his estate equally between Merville Mary Marian Fulford and Lavinia Minnie Stainton, and he appointed C. J. Orton and H. L. Holloway trustees and executors of his will.

The testator died in August, 1892, and letters of administration with the will annexed were granted to M. M. M. Fulford; Orton and Holloway having renounced probate.

The testator was possessed of the house 335, Queen's Road, for the residue of a term of ninety-nine years from September 29, 1866, at a rent of 4*l.* per annum. By the lease he covenanted to pay rent, rates, taxes, and outgoings and to keep the house in repair and insured against loss or damage by fire.

By an indenture of April 16, 1894, Holloway, in exercise of the powers given by the Trustee Act, 1893, appointed M. M. M. Fulford and John Dudley Wolverson to be trustees of the will, and the testator's leasehold property was assigned to them. The only estate now subject to the trusts of the will was the house in question and a sum of 2521*l.* 19*s.* ordinary stock in the City of London Brewery, together with 36*l.* 11*s.* 8*d.* India 3 per cent. stock which represented the proceeds of sale of an option to take new stock in the brewery.

Marian Ross accepted the legacies, married Henry Pascoe, and continued to reside in the house, and on January 28, 1897, she mortgaged to the Reversionary Interest Society, Limited, all her life interest to which she was entitled under the will in the house and the dividends of the stocks. Notice of this mortgage was given to the trustees of the will.

In March, 1903, Mrs. Pascoe gave the society a further charge on her life interests, and notice was given to the trustees.

By an order for foreclosure made on January 14, 1907, in an action in which the society were plaintiffs and Mrs. Pascoe was defendant, it was ordered that she should be absolutely foreclosed from all equity of redemption in the mortgaged premises. Notice of this order was given to the trustees. The society did not

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enforce the order for foreclosure in respect of the house nor in any way enter into possession of it. Mr. and Mrs. Pascoe continued to reside in it and it became very much out of repair. The premiums for fire insurance and the ground rent had been paid since 1903 by the trustees out of the dividends on the stocks; and the remainder of the dividends they paid to the society.

On March 17, 1909, the lessors served a notice to repair under the provisions of the Conveyancing Act, 1881, with a schedule of dilapidations; and as the notice was not complied with they issued a writ in the King's Bench Division against the trustees claiming possession of the house. Mrs. Pascoe was now an inmate of an asylum as a pauper lunatic. Her husband still lived in the house and refused to open the door to inquiries. The society declined to do any of the repairs and disclaimed all interest in the house, although they asserted their right to the stock. It was stated that the repairs would cost about 72*l.* and that the house was worth about 300*l.*

The trustees took out this summons to determine whether the society were liable to perform the covenants of the lease; if not, whether the trustees could do the repairs out of the income of the trust funds, or how they should otherwise be provided for; a receiver of the rents and profits of the house; and so far as necessary administration of the trusts of the will.

J. Rolt, for the plaintiffs.

W. A. Greene, for the society. We object to the dividends being applied towards the repairs of the house. The dividends belong to us and we are not liable for the repairs. Mrs. Pascoe's liability to keep the house in repair is a personal liability. When she accepted the house she entered into an implied contract with the estate to perform the conditions, but that does not affect us. The rule that a defaulting trustee cannot claim any beneficial interest in the trust estate until he has made good his default and that his assignee is in no better position does not apply where the assignor is not a trustee: *Doering* v. *Doering*. (1) We are not liable for anything that has happened since the

(1) (1889) 42 Ch. D. 203.

mortgage: *Stephens* v. *Venables* (1); *Irby* v. *Irby* (2); Lewin on Trusts, 11th ed. p. 873. Mrs. Pascoe accepted the house and she is personally bound to keep it in repair: *Gregg* v. *Coates* (3); *Messenger* v. *Andrews* (4); *In re Williames.* (5)

W. J. Whittaker, for the persons entitled in remainder. In the present circumstances Mrs. Pascoe must be regarded as a trustee of the whole interest which she takes for her life: *Wright* v. *Wilkin.* (6) This is not an equity which arose subsequently; it is a legal claim which has existed the whole time as an inchoate liability. It is not a new contract entered into after the assignment. No fresh obligation has arisen; it is only that the covenants of the lease have become operative. Therefore the society who have taken the house are bound to repair it. They cannot get rid of the liability by a disclaimer and yet keep the dividends. They have taken an assignment of the house and dividends together and can only take the latter if they also take the house subject to the equities which affected Mrs. Pascoe. No doubt the testator's estate is liable for rent and the trustees have applied the dividends in the proper way.

W. A. Greene in reply.

PARKER J. In this case the testator's will contains a gift of the house in which he resided at the date of the will to his housekeeper, Mrs. Pascoe, for her life, she paying the ground rent and performing all the covenants and conditions contained in the lease thereof and keeping the same fully insured against fire; and at her death the house was to be sold and the proceeds held as part of his residuary estate. A gift in that form, if the donee accepts the bounty of the testator, imposes in equity a personal obligation on him to fulfil the conditions of the lease; and, having accepted the conditions, he becomes personally liable to see that the conditions are fully performed. In a subsequent part of the will there is a gift of other property consisting of shares and stocks under which Mrs. Pascoe has also a life interest. These gifts in the will are independent gifts and are

(1) (1862) 30 Beav. 625.
(2) (1858) 25 Beav. 632.
(3) (1856) 23 Beav. 33.
(4) (1828) 4 Russ. 478.
(5) (1885) 54 L. T. 105.
(6) (1860) 2 B. & S. 232.

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not linked together in such a way that one of them cannot be accepted without the other. After the death of the testator Mrs. Pascoe mortgaged her interest in both legacies to the society, and the society foreclosed that mortgage. After the foreclosure they did not attempt to enter into possession of the house, but left it in the possession of the mortgagor and her husband. They gave notice of the order to the trustees of the will, and the trustees have since that date paid the balance of the dividends on the stocks, after payment of rent and insurance premiums, to the society as the persons absolutely entitled. Recently the landlord of the house has served notice under the Conveyancing Act to terminate the lease on the ground of breaches of covenant which Mrs. Pascoe ought to be responsible for. She, however, is in a lunatic asylum and is unable to meet the liability, and the question is whether the society are under that liability in respect of the breaches of covenant which have occurred.

It appears to me that the society have done nothing up to the present time to make them personally liable. The assignment to them did not make them personally liable any more than an equitable assignment of a house would make the assignee liable to the covenants affecting it. It would have been different if after the foreclosure order they had entered into possession, for in that case it might have been argued that they accepted the liability themselves. They did not do anything of that sort, and I cannot see that they are under any liability.

Then the question arises whether they can assert an interest in the stocks, in which Mrs. Pascoe had a life interest, which were included in the mortgage to them, without seeing that the liabilities on the house are discharged. Having regard to the fact that the gifts are independent and the lady is not in the position of a trustee of the will, it appears to me that the position is this, —that until the assignment of her interest in the stocks the trustees of the will might have had an equitable right of set-off in respect of the liabilities which accrued under the obligations of the donee of the house to keep it in repair; but there was nothing to prevent her from assigning her interest in the stocks without reference to her liability on the house in such a way that the assignee of the dividends on the stocks would be free

from any liability in respect of the house. There was no continuing liability which would oblige him to set off the interest on the stocks against the liabilities on the house. Therefore, there being no personal liability on the part of the society to perform the covenants of the lease, and no such equity as that to which I have referred, the society are entitled to retain the interest they have in the stocks without being affected by the liability of the lady in respect of the house. A suggestion has been made that although that would be the ordinary rule, yet having regard to the position of the parties a distinction arises because the house and stocks were included in one and the same mortgage. In my opinion there is nothing in that suggestion. The test is the consideration what would have happened if the mortgage had been made by separate deeds, and I cannot see that in that case the society would have been under any liability at all. The result is that although the society cannot assert a title to the house without giving effect to the condition they can assert a title to the stocks. The best form of order will be to accept their disclaimer of all interest in the house. Then the trustees can deal with the house by sale or otherwise, and if a question arises as to the costs of repairs to the house, inasmuch as the mortgagor cannot pay, the trustees must pay, and there will have to be an inquiry how the costs ought to be borne.

Solicitors: *Avery & Wolverson; Radcliffe, Cator & Hood; F. B. Brook, for Gaunt, Hines & Bottomley, Bradford.*

H. C. R.

PARKER J.

In re LAND'S PATENT.

1910

June 28.

Patent—Lapse due to "unintentional" Omission to pay Fee—Application for Restoration—Patents and Designs Act, 1907 (7 *Edw.* 7, *c.* 29), *s.* 20.

The holder of a patent in respect of an invention applied for a fresh patent in respect of improvements on it, intending to include in it the old invention. Under the erroneous impression that the new patent would protect the original invention and that the patent already protecting it might be allowed to lapse, he omitted to pay the fee in respect of it and allowed it to lapse. On an application for restoration of the lapsed patent:—

Held, that the omission was not an "unintentional" one within the meaning of s. 20 of the Patents and Designs Act, 1907, and that the Court had no jurisdiction to restore the patent.

Quære, whether there is an appeal from the Comptroller-General until after there has been advertisement and opposition under s. 20, sub-s. 3.

In October, 1904, H. S. Land obtained a grant of letters patent, No. 21,571 of that year, for "Improvements relating to lathe and other tool holders for cutting, shaping, and screwing purposes." The letters patent included several matters which had been the subject of prior letters patent obtained by Land in 1899, but no objection was taken at the Patent Office to the inclusion of these matters, as there were not then any provisions relating to searches analogous to those in the Patents and Designs Act, 1907.

On July 3, 1909, Land made an application (No. 17,792 of 1909) for further letters patent, and, under the impression that he could properly do so, he included in his application matters forming part of the subject-matter of the patent of 1904.

Being under the belief that the patent to be granted on the application of 1909 would give him a continuance of the monopoly in the matters previously patented, Land did not pay the renewal fee in respect of the 1904 patent, which became due in October, 1909, and did not discover his mistake until he was informed of it by an examiner at the Patent Office.

On April 14, 1910, after the lapse of the patent of 1904, Land applied to the Comptroller-General of Patents to restore the patent, but on May 18 the Comptroller held that the omission to pay the fee was not "unintentional" within s. 20 of the Patents and Designs Act, 1907, and refused the application.

Land then presented a petition by way of appeal to the High Court of Justice, asking that the Comptroller's decision should be reversed and that he should be directed to proceed with the advertisement of the application to restore.

A. J. Walter, K.C., and *F. C. H. Sinclair*, for the petitioner.

Sargant, for the Comptroller-General. There is a preliminary question whether an appeal lies as regards directing an application to be advertised. I ask the Court to hear the petition as if it were an application for a mandamus, in order that the question what the Act means may be determined.

A. J. Walter, K.C., and *F. C. H. Sinclair*. Land omitted to pay the fee under the mistake that the subject-matter of the old patent would be protected by the new patent, and that the continuance of the old patent would be useless. The question is whether that is an "unintentional" omission to pay within the meaning of s. 20 of the Act of 1907. He never intended to drop his monopoly under the old patent. Before the Act of 1907 a patent which had lapsed on account of the omission to pay fees could only be restored by means of a private Act of Parliament, and the grounds for passing the Acts can only be ascertained from the preambles to the Acts. The question when relief ought to be given was the subject of a report in 1887 by a Select Committee of the House of Lords on Potter's Patent Bill, Skrivanow's Patent Bill, and Gilbert and Sinclair's Patent Bill. That report practically killed applications for relief for about ten years. Since the Act of 1907 there have been many applications for relief, most of which have been successful. The word "unintentional" ought not to be too strictly construed, and may well be held to include a case where omission to pay arises from a mistaken view that the payment was unnecessary.

Sargant, for the Comptroller-General. The only question is whether the omission to pay the fee was unintentional. The Act of 1907 only dealt with one of the large class of cases in which relief could only be obtained by obtaining a private Act. The payment here was not unintentional and the case is not within s. 20.

F. C. H. Sinclair in reply.

PARKER J. 1910 LAND'S PATENT, *In re.*

PARKER J. This is a petition by way of appeal from the Comptroller-General under s. 20 of the Patents and Designs Act, 1907. Prior to the passing of that section a patent which had lapsed by reason of the non-payment of fees could only be restored by Act of Parliament, but the section provides for certain cases in which the Comptroller-General may restore a patent, the words of s. 20, so far as material, being as follows: "(1.) Where any patent has become void owing to the failure of the patentee to pay any prescribed fee within the prescribed time, the patentee may apply to the Comptroller in the prescribed manner for an order for the restoration of the patent. (2.) Every such application shall contain a statement of the circumstances which have led to the omission of the payment of the prescribed fee. (3.) If it appears from such statement that the omission was unintentional and that no undue delay has occurred in the making of the application, the Comptroller shall advertise the application in the prescribed manner, and within such time as may be prescribed any person may give notice of opposition at the Patent Office. (4.) Where such notice is given the Comptroller shall notify the applicant thereof. (5.) After the expiration of the prescribed period the Comptroller shall hear the case and, subject to an appeal to the Court, issue an order either restoring the patent or dismissing the application." There is also a proviso, which I need not read.

It is quite clear that the omission of the payment of the fee is the omission which is referred to in sub-s. 3, and the section only applies if the omission to pay the fee was unintentional. In order that an omission to pay a fee should be intentional, it is only necessary that it should be present to the mind of the person who has to pay the fee that the fee is payable and that he should deliberately elect not to pay it. His reasons for that election are, it appears to me, absolutely immaterial. In the present case the petitioner knew that a certain fee was payable, and under circumstances which he explains in his declaration he did deliberately elect not to pay. His reasons for making that election he also gives, and it appears that he was under an erroneous notion as to the law. He thought that, having applied for letters patent for an improvement in the machine protected

by the original letters patent, and having paid the fee in respect of such application, it was not necessary for him to protect or keep up in any way the original patent. He thought he could rely upon the patent for the improvement as protecting the original invention, and, in that erroneous belief, he deliberately elected not to pay the fee. If I were to say that that omission to pay the fee was unintentional within the meaning of the section, it is difficult to say where one could possibly draw the line in giving the relief for which the section provides, for in every case, if a man deliberately elected not to pay the fee, I should have to consider what his reasons were, and if his reasons were bad—in other words, if he were a man of no common sense—I might have to give him relief, whereas if he were a man of common sense I might have to refuse relief.

The truth is that the section only provides for one of a series of cases in which, prior to the passing of this Act, Parliament used to give relief to patentees, that is, the narrow case of unintentionally omitting to pay the fee. It does not provide for the case where a man deliberately elects not to pay the fee under an erroneous supposition, which influences his conduct, and with which, under this section, it appears to me the Court has nothing to do. Therefore I do not see my way to interfere with the decision of the Comptroller.

What I have said is without prejudice to a certain preliminary question, namely, as to whether I have jurisdiction at all, inasmuch as under sub-s. 3 there is no provision for appeal. The appeal which lies to me is under sub-s. 5, and it is from the decision of the Comptroller-General restoring the patent or dismissing the application after advertisement and opposition, so that I am not certain that I have any jurisdiction; but I have been asked to deal with the matter on the footing that I have jurisdiction in order to give my opinion as to the construction of the Act. I dismiss the petition with costs.

Solicitors for petitioner: *McKenna & Co.*

Solicitor for Comptroller-General: *Solicitor to the Board of Trade.*

F. E.

C. A. 1910

April 27, 28; May 6.

In re LEOPOLD CASSELLA & CO. GESELLSCHAFT M. B. H. (1)

Trade Mark—Registration—Special Application—Liberty to proceed—"Distinctive" Word—Long User—Deceptive Use of Descriptive Word—Trade Marks Act, 1905 (5 *Edw.* 7, *c.* 15), *s.* 9, *sub-s.* 5.

Upon a special application under s. 9, sub-s. 5, to register the word "diamine" for dyes it was proved that the word, which had been used by the applicants as a trade mark for twenty years, had become extensively known to the trade in the United Kingdom as indicating the goods of the applicants. The word was a known chemical term which indicated that the substance to which the word was applied contained two amine groups, but it was used by the applicants for their dyes, whether they contained one, two, or more amine groups or no amine group at all:—

Held, that the word was not distinctive within the meaning of the sub-section, first, because it was descriptive, and, secondly, because it was used deceptively, and that the application ought not to be allowed to proceed.

Per Buckley L.J.: *Semble* "adapted to distinguish" contemplates that the word which it is sought to register is one which as a word is adapted to distinguish the goods and not a word which may by user acquire the capacity of distinguishing the goods.

Appeal from a decision of Neville J.

A special application (No. 311,149) was made by Leopold Cassella & Co. Gesellschaft m. b. H. of Frankfort under s. 9, sub-s. 5, of the Trade Marks Act, 1905, to register the word "diamine" in connection with dyes. The application was referred by the Board of Trade to the Court.

The evidence established that for twenty years past the word "diamine" had been extensively used by the applicants both in Germany and in Great Britain in connection with dyes of their manufacture, and that over a very large portion of the United Kingdom it had become known to the trade simply as indicating the applicants' goods. It appeared that the word "diamine" was a known chemical term and was used in combination with other words as part of the names of substances containing two

(1) M. B. H. = Mit beschränkter Haftung, equivalent to Limited. This abbreviation will in future be used in describing German companies of this class in the *Law Reports*.

amine groups, but that it was used by the applicants for dyes which contained one, two, or more amine groups or none at all.

Neville J. ordered the registrar to proceed with the registration.

The registrar appealed.

Sargant, for the appellant. There are two fatal objections to the registration of this word. (1.) It is a well-known chemical term. Murray's Dictionary defines it as "An amine or compound derived from two molecules of ammonia the hydrogen of which is replaced partly or wholly by one or more basic radicals as Ethene-Diamine." The Century Dictionary defines it as "The name of a class of chemical compounds formed by substituting one or more alcohol radicals for hydrogen in a double molecule made up of two ammonia molecules. Diamines are primary, secondary, or tertiary according as one, two, or three atoms of hydrogen are replaced."

I admit that it is not the name of any particular substance and is not used alone in the singular, but in combination with other words it indicates a particular kind of chemical composition, and in the plural "diamines" it is used to indicate a class of chemical compounds just as "phosphates" is used for a class, though phosphate does not indicate any particular substance. It is part of the English language and it cannot be made capable of registration by the fact that only chemists understand it.

The technical works on dyes shew that the word has not lost its proper signification. Rawson, Gardner and Laycock's Dictionary of Dyes (1901) contains a long list of diamines shewing that the word as applied to dyes denotes not the dyes of a particular manufacturer, but dyes of a particular chemical composition.

(2.) The applicants use the word as a trade mark for a series of dyes most of which are not diamines at all. That false use will cause confusion with traders who use the word in its proper sense.

Colefax, for the respondents, the applicants. Chemically "diamine" is never used except as part of a word, and used alone it does not import anything as to the chemical composition of the dye. For twenty years the word has been associated with the particular dye products of the applicants, and

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per se it never was a descriptive term. Assuming that the word is descriptive, that is not necessarily an objection to its being distinctive, and the evidence is conclusive that if it was at any time descriptive it has now become distinctive. Further, it is important to point out the distinction between the meaning of the word to a chemical expert and its meaning to the public at large: *Eno* v. *Dunn* (1); and assuming that this word when used in combination does import to a man versed in chemistry something about chemical composition, it has no such signification to the public at large. In this connection s. 44 is important, as is pointed out by Fletcher Moulton L.J. in *In re Joseph Crosfield & Sons.* (2) The phrase "adapted to distinguish" merely cuts out laudatory epithets, and the Court there recognized that there is no innate antagonism between "descriptive" and "distinctive" as applied to words. Then as to the alleged deceptive character of the user, fraud on the public is not suggested. The word used in the collocation in which it is used by the applicants is not deceptive because it is not descriptive; it conveys nothing at all to the public as to the chemical composition of the dyes. The word "Orlwoola" stands on a different footing because it was adopted for the very purpose of conveying to the general public that the goods to which it was applied were composed entirely of wool.

Sargant in reply. In *In re Joseph Crosfield & Sons* (2) the Court did not mean to say that only laudatory epithets were not "adapted to distinguish," and their decision upon "Orlwoola" shews the contrary. The intention of the Legislature in adopting that phrase was that a trader should not be allowed to appropriate such part of the language as ought not properly to be made the subject of appropriation. Take the example of aero-planes, the word "aero" could not be appropriated for flying machines.

Cur. adv. vult.

May 6. COZENS-HARDY M.R. This is an appeal from an order of Neville J. directing the Registrar of Trade Marks to proceed with an application for registration of the word

(1) (1890) 15 App. Cas. 252, 260. (2) [1910] 1 Ch. 130.

"diamine" in connection with dyes, and the question is whether that word is a "distinctive mark" within the meaning of s. 9, sub-s. 5, of the Trade Marks Act, 1905. The proper construction of that section was considered by this Court in the recent case of *In re Joseph Crosfield & Sons* (1), and I am therefore relieved from the necessity of discussing it at length; but I would refer to what I said at pp. 141 and 142 with reference to a mere laudatory epithet, which was the case then before us, and I would add that those observations apply with scarcely less force to a word which has direct reference to the character or quality of the goods, and is therefore not "adapted to distinguish the goods of the proprietor of the trade mark from those of other persons" possessing the same character or quality. Now the word "diamine" is not an invented word; it is a known technical English word. It is a word which indicates that the body to which the epithet is applied has a certain composition and contains two amine groups. I fail to see what justification there can be for giving the applicants a monopoly in the use of this epithet. Other persons manufacturing similar bodies containing two amine groups may reasonably desire to use this word as descriptive of the character or quality of their goods. There appears to be no other single word which could express this fact. The applicants have for twenty years used the word "diamine" in connection with their dyes, which are extensively sold in Great Britain, and there is strong evidence, which might perhaps suffice to support an action of deceit, that diamine dyes are known to the trade as the applicants' dyes. The word could not have been registered under the 1883 Act, and in spite of this fact the applicants have established a large trade in this country. But this circumstance is not sufficient to justify a registration under the Act of 1905, notwithstanding the last words of the section. It is admitted by the applicants that they use the word "diamine" on substances whether they contain one or more amine groups or none at all. This seems to me a misleading or deceptive use of the word. I do not think the applicants can derive any benefit from the fact that the word is intelligible only to persons possessing some knowledge of chemistry. Neville J.

(1) [1910] 1 Ch. 130.

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thought the applicants ought to be allowed to proceed with the registration, leaving the opponents to be heard in due course. I am unable to accept this view. I think the registrar was right in his refusal and that this appeal must be allowed with costs.

BUCKLEY L.J. "Diamine" is a word which in the language of chemists, when used as part of the description of the chemical constitution of a body, affirms that the body contains two amine groups. The respondents sell dyes under the name of "diamine colours." Under that head I find in their list colours described as diamine, oxy diamine, diamine nitrazol, diamine cyanine, diaminogene, oxy diaminogene, and para diamine. All these are chemical phrases expressive of chemical constituents in the chemical composition of a body. The respondents have applied for registration of the word "diamine" as a trade mark, and have applied for an order of the Board of Trade or of the Court under s. 9, sub-s. 5, of the Trade Marks Act, 1905, directing registration of the same. Neville J. has directed the registrar to proceed with the registration. This is an appeal from his order. The application is one which does not come in the first instance before the registrar. He cannot proceed unless the Board of Trade or the Court, under s. 9, sub-s. 5, of the Act, direct him to proceed. In this case the matter has been referred to the Court. The Court can (but is not bound to) direct the registration to proceed if it is satisfied that the word is, in the language of the Act, a distinctive word, that is to say, a word adapted to distinguish the goods of the proprietor of the trade mark from those of other persons. By these last words the Act seems to me to contemplate that the word which it is sought to register is one which, as a word, is adapted to distinguish the goods, and not a word which may by user acquire the capacity of distinguishing the goods. Any word in the English language might probably by user be capable of producing a distinction. For instance, if the trader took the word "probably," a word having no sense or meaning at all with reference to the subject-matter, and always put "probably" on his goods, that might in time come to distinguish his goods from

those of others, but it cannot be reasonably said that the word "probably" is a word adapted to distinguish. The Act meant that the trader may take a word which from something in the word itself—say the fact that no one had ever heard the word before, that it was an invented word, or that it indicated the particular trader as distinguished from another trader, but always from something found in the word itself as distinguished from the way in which it is used—is such as to answer the description of being adapted to distinguish the goods. The Act does provide that—not in every case—but in a particular case, namely, that in which (not the word but) the trade mark, is in actual use—the tribunal may take into consideration the extent to which user has rendered the trade mark distinctive. This goes to shew that except in the particular case the mark, and not the result of the user of the mark, is the thing to be regarded.

It was held by this Court in *In re Joseph Crosfield & Sons* (1) that some words (instancing laudatory epithets) are not capable of being registered, but ought to be open to all the world. I assent. But this principle is not confined, in my opinion, to laudatory epithets. It extends so as to forbid the appropriation by one trader of any word forming part of the common stock of the English language, unless the word is one adapted to distinguish the goods in the sense which I have mentioned. It is impossible to say that any word, including even a laudatory epithet, could not be so used as to acquire a secondary meaning. If a trader were so guilty of bad taste and bad English as habitually to describe his goods as (say) "Bestest of all Bests," I can well conceive that in the course of years he might become notorious for his bad taste, and those words might acquire a secondary meaning so as to describe his goods. But the words would not, I think, be adapted to distinguish his goods within the meaning of the Act.

The word "diamine" which the respondents here seek to register conveys in fact and in their manner of using it the idea of a partial description of the chemical constitution of the wares they sell. Other people sell the same wares, and the word as a word is not adapted to distinguish, but on the contrary is

(1) [1910] 1 Ch. 130.

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adapted to confuse and to deceive. There is a mass of evidence to shew that they have used the word for many years, and that to many persons it has come to convey the respondents' goods, and no doubt the concluding words of s. 9 may be called in aid. But while the tribunal is entitled under those circumstances to take into consideration the extent to which user has gone, it is not bound to give effect to that consideration in determining to allow the respondents to proceed with the registration so as to appropriate to themselves (to the extent to which, having regard to s. 44, registration under the Act would appropriate the term to their exclusive use) a word which ought to be open to all for the purpose of expressing the idea which that word conveys. This is a case in which, in my opinion, the Court ought not to make an order under s. 9, sub-s. 5, which would bring within the Act a word which would otherwise lie outside it. On these grounds I think that this appeal succeeds and that the order of Neville J. should be discharged.

KENNEDY L.J. The word "diamine" is a recognized English word which describes something; that something being the chemical composition or constitution of the article to which the word is applied. It predicates that the article contains two amine groups. Reading the language of s. 9 of the Act, I should have said that such a word could not be registered as a trade mark because it is a word which, in its natural and recognized signification, has a direct reference to the character or quality of the article to which it is applied, and is not distinctive in the sense of being adapted to distinguish the goods of the proprietor who used it as a trade mark from those of other persons. But it is not necessary for me in this case to rely upon my own unaided view of the application of the Act to the claim of the respondents to "diamine" as a trade mark since the delivery of the considered judgments of this Court in the case of *In re Joseph Crosfield & Sons* (1), the reasoning in which appears to me to govern the present case.

The respondents rely upon evidence of a widespread and long-continued understanding amongst persons engaged in the

(1) [1910] 1 Ch. 130.

business of dyeing, or commercially connected with that trade, of the word "diamine" as a mark which distinguishes the goods of the respondents, who have used it for rather more than twenty years, from the goods of the other dye producers, and as not conveying to them anything descriptive of the chemical quality of the article to which it is attached. In fact, the respondents' list or catalogue produced to us shews that the respondents do not use "diamine" simpliciter in connection with all the colours, but in some cases oxy diamine, para diamine, and other compounds of "diamine." But, apart from this, I certainly am of opinion that, as the Master of the Rolls held in *Crosfield & Sons' Case* (1) of a "new laudatory epithet" like "perfection," so in the case of a mere descriptive epithet like "diamine" such evidence of user and understanding in a large section of the trade cannot avail to give a registrable character to an epithet which is not in its natural and recognized meaning adapted to distinguish the goods of the trader who seeks to appropriate it as his trade mark under the Act of 1905. And there is, I think, in one respect a stronger case for the Court's refusal to sanction registration where the word which the trader seeks to monopolize is, as here, descriptive of chemical quality applied to goods which do not possess the quality, than where, as in *Crosfield & Sons' Case* (1), the word which it is sought to register is simply a laudatory substantive or adjective: for its use in the former case may actually deceive. I agree that this appeal must be allowed.

Solicitors: *Solicitor to the Board of Trade; Bristows, Cooke & Carpmael,*

(1) [1910] 1 Ch. 130.

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April 21, 25, 26; *May* 11.

MEASURES BROTHERS, LIMITED *v.* MEASURES.

[1909 M. 2987.]

Company—Director—Contract of Service—Restraint of Trade—Breach of Negative Covenant—Interdependent Contracts—Specific Performance—Winding up—Injunction.

The defendant, in July 1903, entered into an agreement with the plaintiff company (of which he was a director) (1.) to hold office for seven years at a fixed salary, and (5.) covenanted that so long as he should continue to hold office, and for seven years after ceasing to hold such office, he would not, either solely or jointly with, or as manager or agent for, any other person or persons or company directly or indirectly carry on or be engaged or interested in any business that would compete with that carried on by the company. In April, 1909, a receiver and manager was appointed in a debenture-holder's action, and a compulsory winding-up order was made against the company. The receiver and manager having given notice to the defendant that his services would no longer be required, and having ceased to pay his salary, the defendant commenced to carry on business on his own account. In an action to restrain the defendant from carrying on business in competition with the company in breach of his covenant:—

Held (Buckley L.J. dissenting), that the plaintiff company could not have specific performance of clause 5 without performing, and they could not now perform, clause 1 in favour of the defendant, and consequently that he was no longer bound by his restrictive covenant and that the company were not entitled to an injunction.

Decision of Joyce J., [1910] 1 Ch. 336, affirmed.

Held by Buckley L.J., that clauses 1 and 5 were not interdependent contracts, that in the events which had happened clause 5 still remained binding on the defendant, and that the plaintiff company were entitled to an injunction.

Appeal from a decision of Joyce J. (1)

The facts and documents are given in greater detail in the report of the case in the Court below, and the following statement of them by Cozens-Hardy M.R. is sufficient for the purposes of this report.

In May, 1899, the plaintiff company was incorporated for the purpose of acquiring the business of a limited company in which the defendant was a large shareholder and a director.

(1) [1910] 1 Ch. 336.

Two agreements were executed on May 6, 1899. By one of these the old company, with the concurrence of the defendant, agreed to sell to the plaintiff company the goodwill and entire undertaking of the old company with certain exceptions not material to be mentioned, the consideration being 330,000*l.*, payable partly in debenture stock, partly in preference shares, partly in ordinary shares of the plaintiff company, and partly in cash. By clause 12 the defendant with certain other persons covenanted that he would not during ten years from the incorporation of the plaintiff company, either solely or jointly with, or as manager or agent for, any other person or company, directly or indirectly carry on or be engaged or concerned in the trade or business of an engineer. This covenant ceased to have any effect in May, 1909. The consideration for the covenant was the payment of the purchase price, which was duly paid in shares and cash. The second agreement of May 6, 1899, was an agreement for service. The defendant thereby became entitled and bound to hold office as working director of the company for seven years from the incorporation of the company at the salary therein mentioned, subject to the provisions of the articles as to events in which the office of a director should be vacated, but he was not to be liable to retire by rotation. By article 97 the defendant was one of the first directors upon the terms of the agreement for service. In July, 1903, the articles were altered by special resolution, so as to make a fresh agreement for service to be entered into.

By an agreement dated July 14, 1903, between the defendant and another of the one part and the company of the other part by clause 1 the defendant was entitled and bound to hold office as director of the company for seven years from June 26, 1903, at a salary of 1000*l.* per annum, together with a share, in certain events, of the net profits of the company's business; and by clause 5 the defendant covenanted that he would not at any time hereafter while he should hold the office of director, or within seven years after ceasing to hold such office, either solely or jointly with, or as manager or agent for, any other person or persons or company, directly or indirectly carry on or be engaged or concerned or interested in the business of engineers

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or ironfounders in any of their respective branches that would in any way compete with or be detrimental to the business carried on by the company, or permit or suffer his name to be used or employed in carrying on or in connection with the said businesses or either of them within the United Kingdom, save so far as he should be interested as a member of the company or be employed as an officer, servant, or agent of the company in the business of the company"; and by clause 6 it was provided that "at the expiration of the term of seven years mentioned in clause 5 the defendant should be entitled, if he thought fit, to continue in office for a further period of seven years, and should during such further period receive by way of remuneration such a sum as might be agreed upon by the directors and the shareholders in general meeting." In April, 1909, a receiver and manager of the company's undertaking was appointed in a debenture-holder's action, and subsequently on October 13, 1909, an order was made for the compulsory winding up of the company. The receiver and manager gave notice to the defendant that his services would no longer be required and that payment of his salary would be discontinued. The defendant thereupon commenced to carry on business as an engineer and ironfounder. This action was commenced by the receiver under the direction of the Court for an injunction.

Joyce J. held that the winding-up order operated as a wrongful dismissal of the defendant, and that, applying the principle of *General Billposting Co.* v. *Atkinson* (1), he was no longer bound by his covenant.

The company appealed. The appeal came on for hearing on April 21, 1910.

Martelli, K.C., and *Whinney*, for the appellants. *General Billposting Co.* v. *Atkinson* (1), on which Joyce J. proceeded, is distinguishable. A mere compulsory winding up is not a repudiation by the company of the contract of service and does not amount to a dismissal of the defendant. By the terms of the contract the defendant was to serve as director for seven

(1) [1909] A.C. 118.

years, and he was entitled to his salary for that period. A director stands on a different footing from a servant, and although the defendant's powers were superseded by the winding up, he could still prove for his remuneration: *Ex parte Logan.* (1) A winding up discharges servants, but it does not discharge directors, although for practical purposes their powers cease: Buckley on Companies Acts, 9th ed. pp. 408, 424. It has been decided that the appointment of a receiver and manager does not disentitle a director from receiving the whole of his salary: *In re South Western of Venezuela (Barquisimeto) Ry. Co.* (2) It is unreasonable that the defendant should be released from his covenant not to compete, because substantially he has received the consideration for the covenant. He was to serve for seven years, and he has received remuneration. The question whether the several clauses of a contract for service of this kind are or are not independent of each other must depend on the good sense of the case: *Campbell* v. *Jones* (3); and "where a person has received a *part* of the consideration for which he entered into the agreement, it would be unjust that because he has not had the *whole*, he should therefore be permitted to enjoy that part without either paying or doing anything for it. Therefore the law obliges him to perform the agreement on his part, and leaves him to his remedy to recover any damage he may have sustained in not having received the whole consideration": Serjeant Williams' notes to *Pordage* v. *Cole* (4), approved by Pollock C.B. in *Ellen* v. *Topp.* (5) Assuming that the winding up operated as a dismissal, there was nothing which amounted to a repudiation of the contract by the company within the meaning of the authorities so as to entitle the defendant to treat the contract as at an end for all purposes: *Mersey Steel and Iron Co.* v. *Naylor, Benzon & Co.* (6) There was nothing in the terms of the contract which prevented the company from winding up: *Cowasjee Nanabhoy* v. *Lallbhoy Vullubhoy* (7); and it was not through any voluntary act of the company that they failed to pay the defendant his full

(1) (1870) L. R. 9 Eq. 149.
(2) [1902] 1 Ch. 701.
(3) (1796) 6 T. R. 570.
(4) 1 Wms. Saund. (1871 ed.) 555.
(5) (1851) 6 Ex. 424, 441.
(6) (1884) 9 App. Cas. 434, 439, 443.
(7) (1876) L. R. 3 Ind. Ap. 200.

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salary. Further, the dismissal was justified by the misconduct of the defendant. There is an implied condition of good faith in every contract of service, and the defendant was guilty of a breach of faith in copying out a list of the customers of the company with the intention of using it after the winding up; and such misconduct is none the less a justification of the dismissal because it was not discovered until after the winding up.

[COZENS-HARDY M.R. referred to Kerr on Injunctions, 4th ed. p. 360.]

Clauses 1 and 5 of this agreement are independent of each other, and there has been no wrongful act of the plaintiffs to bring them within *General Billposting Co.* v. *Atkinson*. (1) The plaintiffs are therefore entitled to an injunction.

Hughes, K.C., and *P. F. Wheeler*, for the respondent. The plaintiff company cannot obtain relief by way of injunction when it is unable to perform its part of the contract. The obligation of the company must be fully performed before the obligation on the part of the defendant arises; his obligation lasts only so long as the company lasts: *Telegraph Despatch and Intelligence Co.* v. *McLean* (2); his service must come to an end before the restrictive covenant can come into force. This is a stronger case than *General Billposting Co.* v. *Atkinson* (1), because here the term of service was for seven years certain, whereas in that case it could be determined at twelve months' notice. The question of what operates as a wrongful dismissal is considered in *Reid* v. *Explosives Co.* (3) and *Brace* v. *Calder*. (4)

The consideration for the defendant's covenant was the payment of a salary for seven years, and the company cannot get relief unless it has carried out its part of the agreement: Kerr on Injunctions, 4th ed. p. 360; *Peto* v. *Brighton, Uckfield, and Tunbridge Wells Ry. Co.* (5) Here there are two interdependent contracts—one that the company will employ the defendant for seven years certain and for a possible further period, the other that the defendant, if so employed, will not on the determination of the contract carry on business in competition with the company.

(1) [1909] A. C. 118.
(2) (1873) L. R. 8 Ch. 658.
(3) (1887) 19 Q. B. D. 264.
(4) [1895] 2 Q. B. 253.
(5) (1863) 1 H. & M. 468.

The readiness to perform is a condition precedent to the right of either contractor to sue: see notes to *Cutter* v. *Powell* (1); and the company cannot recover damages without averring and proving readiness to perform. The Court will not interfere by injunction except in cases where the parts of the agreement which cannot be enforced are independent of those which may be specifically performed: *Ogden* v. *Fossick*. (2)

[KENNEDY L.J. referred to *In re Railway and Electric Appliances Co.* (3)]

It was not suggested in the Court below that there was any misconduct on the part of the defendant that would justify the company in putting an end to the contract. No reasonable objection could be taken to the defendant's conduct in obtaining copies of the lists of customers.

[COZENS-HARDY M.R. I do not think you need go into that point.]

Whinney, in reply. The essence of this agreement was to secure the goodwill of this business to the company and to prevent the defendant from trading in opposition to it. It was not an express condition precedent that the whole term of seven years should be served and paid for before the restrictive covenant could operate. This is a negative covenant, and there is no difference between injunction and damages in the case of a clear negative covenant; all that a Court of Equity has to say is that the thing specified shall not be done, in accordance with the contract between the parties: *Doherty* v. *Allman*. (4) Clauses 1 and 5 are not "mutual covenants," as in *Boone* v. *Eyre* (5), which go to the whole of the consideration so that the performance of one is a condition precedent of the other. [*Gibson* v. *Goldsmid* (6) was also cited.]

Cur. adv. vult.

May 11. COZENS-HARDY M.R. The question in this appeal is whether an injunction ought to be granted to restrain the

(1) (1795) 2 Sm. L. C. 11th ed. p. 9.
(2) (1862) 4 D. F. & J. 426.
(3) (1888) 38 Ch. D. 597, 607.
(4) (1878) 3 App. Cas. 709, 719.
(5) (1779) 1 H. Bl. 273, n.
(6) (1854) 5 D. M. & G. 757, 761.

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defendant from breaking a negative covenant contained in an agreement of July 14, 1903. [Having stated the facts and documents as above, his Lordship continued :—]

I do not think it necessary to consider whether the mutual obligations contained in the agreement of July, 1903, are strictly interdependent, although my impression is that they are so. I prefer to base my judgment upon the ground that the plaintiffs, who are seeking equitable relief by way of injunction, cannot obtain such relief unless they allege and prove that they have performed their part of the bargain hitherto and are ready and able also to perform their part in the future. The consideration which the defendant was to receive for his covenant from the company was (1.) the position of a director of the company ; (2.) the salary of 1000*l.* a year ; and (3.) a contingent share of the profits. The plaintiffs have not given, and cannot in future give, the defendant this consideration. The contract on their part has been broken. It is not necessary that the breach should be wilful in the sense of being intentional. It suffices that by an act brought about by the company's own default, namely, the omission to pay debts incurred by the company, the contract has been broken. As Joyce J. said, the plaintiffs are not entitled against this defendant to specific performance—because that is what it amounts to—of clause 5 of the special agreement without performing, and they cannot perform, the clauses which that agreement contains in favour of the defendant. In my opinion it would be inequitable if the plaintiffs could have that relief. If authority is wanted for this proposition I would refer to *Peto* v. *Brighton, Uckfield, and Tunbridge Wells Ry. Co.* (1) and *Telegraph Despatch and Intelligence Co.* v. *McLean.* (2) In my opinion this appeal fails and must be dismissed with costs.

Buckley L.J., after stating the documents and facts, continued :—The first question to determine is whether the considerations passing between the plaintiffs and defendant under the agreement of July 14, 1903, consist in the mutual promises made by the one to the other or in the performance by each of

(1) 1 H. & M. 468, 483. (2) L. R. 8 Ch. 658.

his obligation as the price of the benefit secured to him by the agreement. Stating it in the concrete form relevant to the particular matter in dispute before us, Was the performance of clause 1 by the plaintiff company a condition precedent to any right in the plaintiff company to enforce clause 5? Am I to read the agreement as if it said, "If the defendant shall for the time mentioned in clause 1 enjoy the place and remuneration promised by that clause he shall, but not otherwise, be compellable to perform clause 5"? In my judgment this question is to be answered in the negative. One event in which the defendant might not enjoy the complete performance by the plaintiffs of the obligations of clause 1 would be a case in which the defendant might have been guilty of misconduct, and the corporation by taking, by special resolution or otherwise, the steps necessary for that purpose had on that ground deprived him of his office. In every contract of service is implied a condition that if faithful service is not rendered the master may elect to determine the contract. In such case in determining the contract for misconduct the master acts under, not against, the contract. He avails himself of a particular right impliedly reserved to him by the contract. He is enforcing, not repudiating, the contract, and remains entitled to enforce provisions in his favour contained in the contract. Had the defendant been rightfully dismissed for misconduct the plaintiffs could, in my judgment, have enforced clause 5, although the defendant would not have enjoyed the full benefit promised to him by clause 1. The same is true if for any of the causes mentioned in article 102 he had vacated his office. In such case clause 4 of the agreement would have had effect. Upon its face, in short, the agreement contemplates that under certain circumstances the term of seven years is not to run its full time. But nevertheless clause 5 is to bind the defendant. Clause 1 and clause 5 are, in my opinion, not interdependent contracts. They are severable.

If the defendant had been guilty of no misconduct, but the corporation had notwithstanding deprived him of his office of director, the case which arose in *General Billposting Co.* v. *Atkinson* (1) would have arisen. That would have been a step

(1) [1909] A. C. 118.

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by which the plaintiffs, wrongfully refusing to employ him further without just cause for so doing, would have repudiated their obligations under the contract. In such case he would have been entitled to take them at their word and to have assented to the contract being repudiated on both sides. The result in that case would have been that clause 5, in common with all the rest of the contract, would have come to an end. Nothing of that kind has here taken place. The action of the receiver and manager in giving notice to the defendant that his services were no longer wanted was not a dismissal by the company, but a refusal of a new engagement by the receiver. In this action the company are plaintiffs, and although the receiver has commenced the action, he has done so by obtaining leave to use the company's name. The whole question is as to the rights as between the company and the defendant.

What has happened is that the plaintiffs did not by affirmative action on their part determine the employment either rightly or wrongly, but that by the operation of a winding-up order made on October 13, 1909, the office itself came to an end. The question is what provision (if any) has the contract made for this event. The obligation of the defendant under clause 5 commenced on the signing of that agreement on July 14, 1903. It was in force while he held the office of director, and was to extend for seven years after he ceased to hold such office. His contention must be not that his restrictive covenant never commenced, but that a restriction which clearly had commenced came to an end by reason of the winding up. The winding-up order was an act in invitum. The fact that it was made does not go to shew that the company was not ready and willing to employ him, but goes to shew that after that order was made the company could not employ him in the office, which is a different proposition. He has ceased to hold his office, and the contract upon its true construction, I think, is that when he ceases to hold his office, whether under clause 4 by the operation of some event mentioned in article 102 by vacation of his office or in any other way, not being a wrongful dismissal, which brings *General Billposting Co.* v. *Atkinson* (1) into play, he shall be bound by

(1) [1909] A. C. 118.

the restrictive covenant. If I am right in holding that clauses 1 and 5 are not interdependent contracts, that the performance of clause 1 is not a condition precedent to the continuance of the restriction in clause 5, it results that in the events which have happened clause 5 remains binding upon the defendant. For these reasons I think that the plaintiff company are entitled to an injunction.

KENNEDY L.J., after stating the agreement, continued:— The effect of the provisions of the agreement of July 14, 1903, and of the events which I have stated, is clear. By the agreement the plaintiff company on its side undertook to retain the defendant in the office of director for seven years at a certain rate of remuneration, subject to certain provisions in the articles of association as to the vacating of the office of director (as to which no question arises in the present case); and, further, at the end of the seven years, if he was willing, to continue him in his office of director, for a remuneration to be then agreed, for a further term of seven years. The defendant on his side bound himself whilst director to discharge his duties and responsibilities as set forth in clause 2, and agreed to covenant not to enter into competition with the plaintiff company in business, and, after he should cease to be a director, not to enter into such competition for seven years as provided by clause 5 of the agreement. The effect of the events of 1909 in relation to the plaintiff company was unquestionably (I purposely use, for the moment, a phrase which is as favourable to the plaintiffs as possible) to render the company admittedly and finally unable to fulfil its agreement for the continuance of the defendant as a director long before the expiration of the seven years' period, which, according to the agreement, would have lasted until July 14, 1910; and, further, to put an end to the possibility of its ever fulfilling the stipulation for the defendant's benefit in regard to a further term of seven years which is contained in clause 6 of the agreement.

Now, if the express terms of the written document are alone considered, the legal obligation of the plaintiff company to continue the defendant as a director for the periods and upon the

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terms of remuneration therein appearing is qualified only by the reference in clause 4 to the possibility of the defendant's office as director being vacated under certain provisions in the articles of association, which have not come into operation in the present case. So far as it goes, this express qualification tends to negative the propriety of implying any others. But there can be no doubt that the plaintiff company, under this agreement, without losing any right to insist upon the fulfilment by the defendant of his obligations under the contract, or to sue for damages for the breach of them, would be relieved from further performance on their part, if the defendant at any time during the contract period, of his own motion, had resigned his office or refused to act as director, or had otherwise prevented the plaintiff company from performing their part of the agreement. It is elementary justice that one of the parties to a contract shall not get rid of his responsibilities thereunder by disabling the other contractor from fulfilling his part of the bargain. Nothing of this sort occurred in the present case. Beyond and besides this implication of law, which forms part of all contracts, the Courts, in construing documents which create a contractual relationship, such as that of employer and employed or principal or agent, for a specified period, will, if from its terms, considered in a reasonable and businesslike manner, such an implication fairly arises, imply a condition that the contract is to remain in force only so long as a certain state of things continues to exist, and will therefore hold that if the condition ceases to exist within the agreed period of relationship neither party can treat the cessation of the performance of the contract which thereupon ensues as an actionable breach of contract. Instances of this are to be found in *Cowasjee Nanabhoy* v. *Lallbhoy Vullubhoy* (1) and *Turner* v. *Goldsmith.* (2)

The first step in the argument put forward on the part of the plaintiffs asserts that such an implication ought to have a place in the construction of the present contract, and that as the winding up of the plaintiff company which involved the determination of the defendant's office and right to remuneration was not due (as it is argued) to voluntary action on the part of the

(1) L. R. 3 Ind. Ap. 200. (2) [1891] 1 Q. B. 544.

plaintiff company, the plaintiff company, according to the term to be implied in the agreement, did not become thereby guilty of any actionable breach of contract, and, not being guilty of any breach, may treat the contract as subsisting as against the defendant.

It appears to me that even upon the assumption that what took place in 1909 in the winding up of the company and the displacement of the defendant from his office did not constitute an actionable breach of contract on the part of the plaintiff company, this reasoning of the plaintiff company is unsound. When Lindley L.J. in *Turner* v. *Goldsmith* (1) spoke of a contract being subject to an implied condition that is to be in force only so long as a certain state of things continues, he did not mean ceasing to be in force for one of the parties only. On both sides alike, in the case supposed, there is an end, in regard to the future, of all contractual rights and liabilities. No case, except *General Billposting Co.* v. *Atkinson* (2), was cited to us, and I have been unable to discover any, in which a plaintiff who has ceased to be able to carry out the material part of his obligations has tried to enforce such a claim as the present; but there are some observations, very pertinent to this contention of the plaintiff company, in the judgment of Lord Penzance in *Rhodes* v. *Forwood.* (3) That was a case of a claim by the respondents in the House of Lords against Rhodes on an agreement of agency made with the respondents for the sale of the appellants' coal for a period of seven years. The House of Lords, upon the contract in that case, held that Rhodes was not liable to an action for selling his colliery, whereby, as the respondents alleged, their agency had been improperly terminated. There appears to have been in the contract a clause forbidding the respondents from selling the coal of other persons during the agency, and it was suggested that the effect of the contract was an undertaking by the respondents not to act as agents for the sale of any other steam coal for eighteen months after the termination of the agency. Lord Penzance in the course of his judgment said (4): "I wish to add

(1) [1891] 1 Q. B. 550.
(2) [1909] A. C. 118.
(3) (1876) 1 App. Cas. 256.
(4) 1 App. Cas. 274.

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one more word upon a suggestion which has been made, that the agents here might be bound for eighteen months not to act for anybody else, notwithstanding that Rhodes had in the meantime sold the colliery. The question, whether they are so bound, does not arise in this case, but I should be sorry to affirm the proposition, that when the defendant had sold the colliery, and had, therefore, practically entirely put an end to the agency, the plaintiffs were still bound not to act for any one else, for I find the terms of the contract upon that subject are these, that Messrs. Forwood and Paton 'will not, during the continuance of their agency, act as agents for the sale of any other steam coal.' If the defendant by selling the colliery had put an end to the agency, it might perhaps be very successfully contended that the other party was at liberty to act for other coal proprietors. But that point does not arise in the present case, and, therefore, I desire only to speak negatively, and not to express an affirmative opinion upon it at present."

I am of opinion in the present case that even upon the view of the legal effect of the events of 1909 which is most favourable to the plaintiff company, namely, that those events did not give the defendant a right of action, the case against the defendant fails, because, even on this view, the contractual relation was determined by those events, or, in the words of Lord Penzance, had been "practically put an end to," and the subsequent conduct of either party could give no right of action to the other under the contract which had ceased to be in force.

In fact, however, I agree with Joyce J. that the events of 1909 ought to be treated as a breach of contract on the part of the plaintiff company effecting a deprivation by the plaintiff company of the rights which the company had bound itself to give to the defendant, which was wrongful in the sense of constituting an actionable breach of contract, and which, whether voluntary or involuntary, involved in substance and effect an unqualified declaration to the defendant of the plaintiff company's inability in the future to fulfil its contract with the defendant. If, having contracted with another, I find myself incapacitated by circumstances from performing, or continuing to perform, my contract, the fact that the non-performance arises from misfortune, and

not either through any negligence or wilful refusal on my part, does not shield me from the legal consequences, unless I have either expressly or impliedly bargained in my contract not to be liable for non-performance, except where it arises from negligence or wilful default. I see no ground for reading into the text of the present contract any such shielding stipulation. It is plain that the continuance of the director in his office was the essential consideration for the defendant's covenant. I incline, indeed, to the opinion, although it is not necessary so to decide, that the displacement of the defendant in the present instance may be regarded as having been caused by an actual default of the plaintiff company. In *Reid* v. *Explosives Co.* (1), which was a case in which at the instance of debenture-holders the Court of Chancery had appointed a receiver and manager, and the decision of the Court of Appeal involved a finding that the appointment of the receiver and manager operated as a wrongful dismissal of the servants of the company, Lord Esher M.R. said (2): "If there were one mortgagee of a business he might, on the failure of the mortgagor to comply with the terms of the mortgage agreement, take possession of the business. What would be the effect of that on the servants of the mortgagor who had contracts entitling them to notice of dismissal? Would the fact of the mortgagee taking possession be equivalent to dismissal by the mortgagor? We have tried to test that by the case of an employer who has servants in the same position and who shuts up his business. That would amount to a wrongful dismissal, and would give the servants a right of action. So the fact of a mortgagee taking possession of the business of the mortgagor would be equivalent to a dismissal of the servants, and as this would occur by the default of the mortgagor, it would be a wrongful dismissal and would give a right of action." The defendant in the present case was not a servant, but a director. But it appears to me that the positions of the director under the present contract and of the company's servants in the case cited are so far alike that the passage which I have quoted is a strong authority to shew that what took place in 1909 in the present case terminating the defendant's office

(1) 19 Q. B. D. 264. (2) 19 Q. B. D. 267.

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ought to be treated not merely as a misfortune of the company or something done in invitum, but a default on the part of the company. If this be so, the recent decision of the House of Lords in *General Billposting Co.* v. *Atkinson* (1) is directly in point and is conclusive against the plaintiff company's case.

A great deal of argument before us was expended on behalf of the appellants to shew that covenants or stipulations in the present case were not interdependent, and, therefore, that even if the plaintiff company broke the agreement made with the defendant, it could nevertheless sue him for the alleged breach of his part of the agreement. Covenants are to be construed as dependent or independent according to the intention of the parties and the good sense of the case. Judged by this test, the supposition that the true intent and meaning of this agreement was that the defendant should be bound to the observance of clause 5, although the company failed to a substantial extent to give him the sole consideration for his obligation, appears to me to be an impossible supposition. The judgments of Lord Robertson and Lord Collins in *General Billposting Co.* v. *Atkinson* (1), as it seems to me, negative the correctness of the contention in such a case as the present.

It appears to me, on the grounds which I have stated, that the judgment of Joyce J. was perfectly right. Those reasons would apply whether the plaintiffs' claim was for damages or for the equitable relief by injunction, which the plaintiff company has preferred to put forward. But I desire to express my concurrence, in regard to the plaintiff company's claim, as a claim for equitable relief, in the view which has been expressed by the Master of the Rolls in his judgment, which I have had an opportunity of perusing.

In my opinion the appeal should be dismissed with costs.

Solicitors: *Budd, Johnson & Co.; Wetherfield, Son & Baines.*

(1) [1909] A. C. 118.

W. C. D.

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[1908 E. 662.]

Tramway — Statutory Powers — Ultra vires — Adjacent Districts — Working Agreement—Agreement for Lease to adjacent Owner—Delegation of Powers by Lessee—Licence to work—Consent of Board of Trade—Tramways Act, 1870 (33 & 34 *Vict. c.* 78), *ss.* 34, 35, 54.

The plaintiffs, a local authority, were authorized by a special Act which incorporated Parts II. and III. of the Tramways Act, 1870, to construct and maintain certain tramways in their district and to enter into agreements, subject to the approval of the Board of Trade, with tramway owners of adjacent districts with respect to the construction, sale, lease, working, use, and management by the contracting parties of all or any of their respective tramways. The proposed tramways were adjacent to tramways outside the plaintiffs' district of the defendant company on the west and of the defendant corporation on the east. Both the defendant company and the defendant corporation had under their special Acts similar powers of entering into working agreements with the tramway owners of adjacent districts, except that the consent of the Board of Trade thereto was not required. The tramways authorized by the plaintiffs' special Act were constructed by the defendant corporation under the terms of an agreement entered into between the plaintiffs and the defendant corporation, with the approval of the Board of Trade, and the defendant corporation were entitled thereunder to a lease for a term of years of the exclusive use of such tramways, but subject to a proviso that they should not assign or sub-let or part with the benefit of the agreement without the leave of the plaintiffs. During the continuance of the agreement the defendant corporation, without the leave of the plaintiffs and without the sanction of the Board of Trade, granted to the defendant company a revocable licence to run over a small portion of the plaintiffs' tramways which adjoined the defendant company's tramways :—

Held, that neither under the Tramways Act, 1870, nor under their special Act had the plaintiffs any power to authorize the defendant company to run cars over their tramways without the consent of the Board of Trade, and that their agreement with the defendant corporation did not purport to confer on the latter any greater right than that which the plaintiffs had authority to grant; *held*, therefore, that the licence granted to the defendant company was ultra vires, and an injunction was granted to restrain the defendant company from using the plaintiffs' tramways.

Appeal from a decision of Eve J.

By this action the Eccles Corporation claimed a declaration

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that the Salford Corporation were not entitled to authorize the South Lancashire Tramways Company (hereinafter called the tramway company) to use the tramways of the plaintiffs or any part thereof and an injunction to restrain the tramway company from running tramcars over and along the said tramways and from otherwise using or trespassing upon the said tramways.

The borough of Eccles was bounded on the east by the borough of Salford and on the west by the Worsley urban district. The tramway company owned and worked tramways in the Worsley urban district and elsewhere under the Lancashire Tramways Acts, 1900 to 1903, and the Salford Corporation owned and worked tramways in their borough under the Salford Corporation Act, 1899. The tramways of the tramway company extended to the western boundary, and the tramways of the Salford Corporation to the eastern boundary, of the borough of Eccles.

By the Eccles Corporation Act, 1901 (1 Edw. 7, c. cxxii.), Parts II. and III. of the Tramways Act, 1870, so far as the same were applicable for the purposes of and not varied by or inconsistent with the Act now in statement were incorporated therewith (s. 3), and the Eccles Corporation were empowered to lay down, use, and maintain certain tramways, including the tramway in question in this action, within the borough of Eccles (s. 5), and were liable to maintain and keep in good repair the rails of the tramways and the sub-structure on which they rested, and were subject to penalties in case of default (s. 13).

Sect. 24 provided as follows: "The corporation may enter into and carry into effect contracts and agreements with the owner and lessee of any tramways in any adjacent district which can be worked with any of the corporation tramways and the local authority of such district with respect to the alteration construction maintenance purchase sale lease working use and management by the contracting parties of all or any of their respective tramways and works or any part or parts thereof respectively the making of all necessary junctions the supply under and during the continuance of any agreement for all or any of the respective tramways of the contracting parties being worked by the other of them as aforesaid of rolling stock plant machinery and electrical energy or power necessary for the

purposes of such agreement . . . . the payments to be made and the conditions to be performed in respect of such alteration construction maintenance working use and management the interchange accommodation conveyance transmission and delivery of traffic coming from or destined for the respective undertakings of the contracting parties and the division and apportionment of the revenue arising from such traffic and the payment of any fixed or contingent rent:

"Provided always that the term of any such lease or working agreement shall not exceed forty-two years and that the conditions thereof shall be subject to the approval of the Board of Trade."

By the Salford Corporation Act, 1899 (62 & 63 Vict. c. ccxliv.), Parts II. and III. of the Tramways Act, 1870, were incorporated therewith (s. 3) in language similar to that used in the Eccles Corporation Act, and by the definition clause (s. 4) "the corporation tramways" included "any tramways for the time being belonging or demised to or worked by the corporation."

Sect. 28 conferred upon the corporation power to enter into working agreements with adjacent tramway owners in terms substantially similar to the language used in s. 24 of the Eccles Corporation Act except that the section contained no restriction as to the duration of any lease or working agreement thereunder and did not require the consent of the Board of Trade to such lease or working agreement.

By s. 83 of the South Lancashire Tramways Act, 1900 (63 & 64 Vict. c. ccxliii.), and s. 41 of the South Lancashire Tramways Act, 1903 (3 Edw. 7, c. clviii.), each of which Acts incorporated Parts II. and III. of the Tramways Act, 1870, except as varied by the special Act, similar powers of entering into working agreements with adjacent owners were conferred upon the tramway company, but neither of these sections contained any provision requiring that such agreements should receive the approval of the Board of Trade.

By an agreement dated April 11, 1902, and made between the Eccles Corporation and the Salford Corporation and duly approved by the Board of Trade, the Eccles Corporation empowered the Salford Corporation at the expense of the former

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to construct the tramways comprised in the Eccles Corporation Act, 1901 (thereinafter called the tramways), including the tramway in question in this action. By clause 14 the Eccles Corporation agreed to grant to the Salford Corporation a lease for thirty-five years from a date now past to use, work, and run cars with flange wheels upon the tramways, such lease to contain covenants, stipulations, and agreements in the terms of or to the effect mentioned in the fourth schedule to the agreement or as near thereto as circumstances would permit, with all other covenants, stipulations, or agreements as might reasonably be appropriate in order to effectuate the true intention of the agreement, and by clause 18 the provisions of the fourth schedule were to apply until the lease should take effect.

By clause E of the fourth schedule the Eccles Corporation were to maintain the tramways with the permanent way and also the electrical equipment of the tramways in an efficient state for traffic and to execute all repairs and renewals requisite therefor from time to time to the reasonable satisfaction of the Salford Corporation.

Clause F provided as follows: "The agreed lease shall be made with the benefit of the rights and subject to the powers and obligations of the Eccles Corporation under any Act or Order relating to the tramways (except where inconsistent with the terms of this agreement and of the agreed lease) and be subject to the approval of the Board of Trade if and so far as necessary. Provided always that nothing contained or implied in this agreement or in any such Act or Order shall enable the Eccles Corporation by any act or omission on their part to confer upon any person or body (other than the Salford Corporation) or upon the public or to reserve to or confer upon the Eccles Corporation (except as by this agreement is expressly reserved and provided) any right during the continuance of the agreed lease to use the tramways either concurrently with the Salford Corporation or otherwise by means of carriages with flange wheels or wheels suitable only to run on the rails of the tramways the intention of the two corporations being that the Salford Corporation are to have assured to them by the agreed lease (except and subject as hereinafter provided) the exclusive use of

the tramways by means of carriages with flange wheels or wheels suitable only to run on the rails of the tramways."

By clause O the Salford Corporation agreed to permit the Eccles Corporation whenever required between the hours of midnight and 5 o'clock in the morning to use the tramways for scavenging purposes, provided that the Eccles Corporation should not exercise such right so as to interfere with the use of the tramways by the Salford Corporation.

Clause R provided as follows: "The Salford Corporation shall not assign or sub-let or part with the benefit of this agreement or the agreed lease except by licence under seal of the Eccles Corporation and upon breach of this stipulation the Eccles Corporation may forthwith determine and cancel the said agreement or agreed lease and the interest of the Salford Corporation thereunder shall thereupon cease without prejudice to any liability previously incurred by them to the Eccles Corporation."

No lease had in fact been granted to the Salford Corporation. The tramways mentioned in the agreement were duly constructed by the Salford Corporation and were worked by the corporation pursuant to the agreement, the Eccles Corporation supplying the electrical energy therefor, but a small portion of the line which lay between the junction of Parrin Lane with Worsley Road and Alder Forest, which was on the western boundary of the borough of Eccles (being the tramway in question in this action), was only intermittently worked by the Salford Corporation. This tramway formed the connecting link between the Eccles tramways and the tramways of the South Lancashire Tramways Company. On June 2, 1908, the Salford Corporation granted to the tramway company a licence to use this part of the line upon the terms of a letter of that date addressed by the general manager of the tramways of the Salford Corporation to the general manager of the tramway company. The letter stated as follows:—

"Referring to the interview between us yesterday I beg to inform you that if your company desire to run cars over the line leased to the Salford Corporation between Alder Forest and Parrin Lane, Winton, the Tramways Committee will be quite

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prepared to permit it on the understanding that you pay us for the current used by such cars at the rate of 1·89*d.* per car mile run, and also a further sum of three pence per car mile run, to cover the maintenance of the lines, overhead equipment etc. It must be distinctly understood that it is a mere licence and confers no rights whatever on your company and the corporation will be entitled to stop the cars running whenever they so desire, and your company will be entitled to cease running at any time they desire."

In answer to remonstrances from the Eccles Corporation the Salford Corporation claimed the right to authorize the tramway company to run cars over the tramway in question without the leave or licence of the Eccles Corporation, and thereupon the Eccles Corporation issued the writ in this action.

Eve J. held that the licence was not ultra vires of the defendants or either of them and was not a breach of the agreement of April 11, 1902, and he dismissed the action.

The plaintiffs appealed.

P. O. Lawrence, K.C., and *Harman*, for the plaintiffs. A statutory lessee of the right to use a tramway cannot delegate his power by granting a revocable licence to others to run over the tramway: he is not in the same position as, for example, the lessee of a house, and he cannot part with his rights. The Eccles Corporation Act, 1901, incorporates Parts II. and III. of the Tramways Act, 1870, and by s. 34 in Part III. of that Act promoters and their lessees are granted the exclusive use of their tramways for carriages with flange wheels. That right is an interference with the general rights of the public to the use of the highway and it is a personal right limited to the promoters and their lessees: *Edinburgh Street Tramways Co.* v. *Lord Provost of Edinburgh.* (1) That is in accordance with the general principle that where powers are conferred by Act of Parliament affecting the rights and interests of the public those powers can be exercised only by the persons or bodies on whom they are specially conferred: *Gardner* v. *London, Chatham, and Dover Ry. Co.* (2); *Omnibus Conveyance Co.* v. *Liverpool*

(1) [1894] A. C. 456, 463. (2) (1867) L. R. 2 Ch. 201, 212.

United Tramways and Omnibus Co. (1) The plaintiffs had no power to grant to the defendant corporation any right to delegate their powers and they did not purport to do so, and therefore it is immaterial to consider what are the powers of the defendant corporation or the defendant company. The only section in the Tramways Act, 1870, which deals with licences is s. 35 in Part III., which empowers the Board of Trade to grant licences in certain special cases, and the presumption is that the plaintiffs have no power to grant a licence except so far as they are expressly authorized to do so by their special Act, but s. 24 of that Act, which is the only relevant section, requires that every working agreement shall be sanctioned by the Board of Trade. And if the plaintiffs could not have granted this licence their lessees could have no higher right. Reliance was placed by Eve J. on clause R of the fourth schedule to the agreement of April 11, and it was supposed, on the principle of exclusio unius, &c., that the proper inference to be drawn from that clause was that it left the defendant corporation at liberty to grant licences, but there is no ground for that view. That clause, no doubt, was inserted ex majori cautela to remove any doubt as to the incapacity of the lessees to part with their rights under the agreement and was merely declaratory of the existing law, because apart from that clause a statutory lessee of a tramway could not part with his rights. A further objection to the licence is that the plaintiffs are under a statutory liability for penalties for certain things, but they have no control over the servants of the licensees.

Jessel, K.C., and *Austen-Cartmell*, for the defendant company. Sect. 28 of the Salford Corporation Act, 1899, coupled with the definition of "corporation tramways" contained in that Act in terms authorizes the defendant corporation to enter into any working agreement as to the use of such tramways without the approval of the Board of Trade. Such a use includes the licence granted by the corporation to the defendant company in this case, and if that is the true construction of the section it takes effect notwithstanding the general provisions of the Tramways Act, 1870, the incorporation of which is subject to the provisions

(1) (1882) 26 Sol. J. 580.

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of the special Act, and the general rule laid down by the cases in relation to the exercise by statutory bodies of powers affecting the rights of the public. Under s. 83 of the South Lancashire Tramways Act, 1900, and s. 41 of the supplemental Act of 1903 the defendant company have power to work the tramway in question under this licence without the consent of the Board of Trade. Further, the Act of 1870 contains nothing which requires the consent of the Board of Trade to a mere licence. Although the Courts have put upon statutory bodies such as railway and tramway companies an embargo which prevents them from selling or leasing without the express permission of the Legislature, that embargo does not extend to licensing: *Midland Ry. Co.* v. *Great Western Ry. Co.* (1) This licence therefore is not ultra vires and it is not a violation of the agreement of April 11.

Clayton, K.C., MacSwinney, and *Sutton,* for the defendant corporation. The question turns upon clause R of the fourth schedule to the agreement. Whatever rights were conferred on the plaintiffs, those rights were transmitted in full to the defendant corporation during the continuance of the agreement. Those rights according to the definition in s. 34 of the Tramways Act, 1870, include the exclusive use of the groove in the rail for the use of tramcars with flange wheels, and that exclusive use is not a mere easement, but is property in respect of which the tramway authority are rateable to the poor: *Pimlico Tramway Co.* v. *Greenwich Union* (2); *Wakefield and District Light Rys. Co.* v. *Wakefield Corporation.* (3) There is therefore nothing left in the plaintiffs, and the defendant corporation are for the time being in the position of owners. Neither in clause R nor elsewhere in the agreement is there anything which prevents the defendant corporation from granting this licence. The consent of the Board of Trade is not necessary to a mere licence. Sect. 35 of the Tramways Act, 1870, deals only with the case of a tramway authority neglecting to use their powers and has no application to the present case. That Act, no doubt, did not contemplate anything less than a lease, but subsequent Acts have shewn that in order to facilitate the

(1) (1873) L. R. 8 Ch. 841.
(2) (1873) L. R. 9 Q. B. 9.
(3) [1907] 2 K. B. 256, 267; [1908] A. C. 293.

interchange of communication it is desirable that something less than a lease should be allowed, namely, working agreements. The plaintiffs having parted with all their rights during the continuance of the agreement, it is competent to the defendant corporation to grant and to the defendant company to accept a licence to use this tramway without the consent of the Board of Trade. All that was decided in *Edinburgh Street Tramways Co.* v. *Lord Provost of Edinburgh* (1) was that the right to the exclusive use of the groove in the tram line could not be passed on to an unauthorized person. This licence is not a breach of the agreement and it is not ultra vires for want of the consent of the Board of Trade. But, assuming that the consent of the Board of Trade is required, as against the company this is an action for trespass, and the plaintiffs can make no claim against the company for trespass because they are not in occupation of the tramway, and the Court will not make a declaratory order where no substantive relief can be granted. This action therefore cannot be maintained.

COZENS-HARDY M.R. This is an appeal from a decision of Eve J. and it raises a question of general importance as to the extent to which persons or corporations—I will call them "persons" for convenience—in whom Parliament has vested certain parliamentary franchises with reference to public tramways can, of their own will and motion, license and authorize other persons to use those tramways upon such terms as the persons granting the licence may think fit.

Now the general scheme of the tramways legislation which began in 1870 was undoubtedly to impose very great restrictions upon the user of tramways. We must start with the proposition, which really has not been challenged, that a parliamentary franchise of this kind is not a bit of property which the owner can dispose of just as he might a stick or a table or an acre of land; it is nothing of the kind. I cannot state the proposition better than it was stated by Lord Herschell in the case of *Edinburgh Street Tramways Co.* v. *Lord Provost of Edinburgh* (2), which has been cited to us.

(1) [1894] A. C. 456. (2) [1894] A. C. 463.

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He points out that the promoters obtained power to interfere with public highways by laying down tramways upon them and maintaining the tramways so laid down, and he refers to s. 34 of the Act of 1870. Then he says this: "It will be seen that the power thus conferred is limited to the promoters and their lessees, the promoters being the person or company authorized to construct the tramways. The right conferred is a personal one, and cannot be claimed by any persons who do not come within the designation of promoters or lessees of promoters. It is not conferred upon the promoters' assignees. A conveyance, therefore, by the promoters of their tramways, or even of their undertaking, would not carry with it the right to the statutory monopoly conferred upon the promoters by the section to which I have referred." The Tramways Act, 1870, contains various provisions entirely consistent, and only consistent, with that view. In the first place s. 19, which I agree does not apply to this particular tramway, contemplates that the promoters may, but only with the consent of the Board of Trade, lease the right of user. Sect. 35 contemplates that in certain circumstances the Board of Trade may from time to time grant licences to use the tramway. Sect. 54 contemplates that persons may be liable to a penalty for using the tramway otherwise than upon the terms provided by the Act. The words are, "If any person (except under a lease from or by agreement with the promoters, or under licence from the Board of Trade, as by this Act provided,) uses a tramway or any part thereof with carriages having flange wheels or other wheels suitable only to run on the rail of such tramway, such person shall for every such offence be liable to a penalty not exceeding twenty pounds." So that so far as this Act is concerned it seems to me plain that the first defendants, that is to say the South Lancashire Tramways Company, would be liable to a penalty because they are using this tramway with carriages of this nature, and they are not using it "under a lease from or agreement with the promoters," nor are they using it "under licence from the Board of Trade," for the Act of 1870 throughout draws a clear distinction between the promoters on the one hand and lessees on the other, and it is impossible on that section, or

anywhere else throughout the Act, to say that promoters really would include lessees, and that, therefore, it would be sufficient for a person to have a licence or an agreement with the lessees. So much for the Act of 1870.

Then we come to the Eccles Corporation Act. That Act was passed in 1901. It incorporated, amongst others, Parts II. and III. of the Tramways Act, and the provisions of that Act are made to apply to this Eccles tramway except in so far as there is anything inconsistent therewith in the Act itself. That Act empowers the Eccles Corporation to make tramways on the lines there mentioned, lines which go from the westernmost part of the district of the corporation to the boundary, on the other side, of Salford, Salford being on the east and the lines of the South Lancashire Company being on the west. The corporation are bound by s. 13 at all times to maintain and keep in good condition and repair the rails of the tramways and any sub-structure on which they may rest. The mode in which the tramways are to be worked is provided for by s. 19, and s. 24—I am reading it shortly—says this: "The corporation may enter into and carry into effect contracts and agreements with the owner and lessee of any tramways in any adjacent district which can be worked with any of the corporation tramways and the local authority of such district with respect to the alteration construction maintenance purchase sale lease working use and management by the contracting parties of all or any of their respective tramways and works or any part or parts thereof respectively," and then it goes into various details, including the interchange of traffic; but there is this proviso: "Provided that the term of any such lease or working agreement shall be subject to the approval of the Board of Trade." It is under that section that an arrangement or an agreement, to which I shall have to call attention in a minute, was entered into between Salford on the one hand and Eccles on the other in April, 1902, that agreement being approved by the Board of Trade, and really when you recognize this, that it is quite plain that Eccles could not have made an agreement authorizing the South Lancashire people to use the little bit of line in question in this action without the licence of the Board of Trade, it does

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seem to me to be perfectly hopeless to contend that the Salford Corporation, to whom they have granted a limited use, have a greater power than Eccles itself would have, and could of their own will and pleasure, and upon such terms as they think fit, without asking the Board of Trade, give a right to use this little bit of the tramway within the Eccles district. I have listened and I have sought in vain to see how the contrary view could be supported. Eve J. seems to have thought that the conclusion was justified by the fact that the Salford Corporation on the one hand and the South Lancashire Company on the other hand have powers conferred on them making it intra vires for them to enter into contracts of this nature outside the limits of their own district; but that did not in any way defeat or render inoperative the general provision to which I have referred, namely, that no such agreement could be made without the licence of the Board of Trade. He seems to have thought, in short, that the effect of these powers was simply to put, for the purpose of these contracts, the Salford Corporation on the one hand and the South Lancashire Company on the other in the position of individuals who were not fettered by those limitations which attach otherwise to all statutory corporations such as they are. With great respect to the learned judge I am entirely unable to assent to the view that a clause enabling these corporations to enter into an agreement of this nature, which agreement requires the consent of the Board of Trade, can in any way lend colour to the suggestion that it authorizes them to enter into any such agreement without asking the consent of the Board of Trade. That is really, I think, in short, the point of the case. There is nothing in the agreement of 1902 which, as I read it, purports to confer a greater right upon Salford than Eccles could reasonably give them, and even if it did it would not in any way assist the present case. I think it is impossible to read this agreement without seeing that all that was granted by it was, with the consent of the Board of Trade, the right to do that which was authorized by the statute, and nothing whatever beyond that.

For these reasons it seems to me that this is a case in which it is quite right that we should grant the relief asked by the statement of claim. There will be, first, a declaration that the

defendant corporation are not entitled to authorize the defendant company or any other persons or corporations to use the tramways of the plaintiffs or any part or parts thereof, and, secondly, an injunction to restrain the defendant company, their servants and agents, unless and until duly authorized by law, from running tramcars over and along the lines of tramways belonging to the plaintiffs and situate within the said borough and from otherwise using or trespassing upon the said tramways.

FARWELL L.J. I am of the same opinion. The Tramways Act of 1870 has been before the Courts a good many times since it passed, and I think it is now well settled that the interference with the public highways thereby authorized for the purpose of laying down tram rails, and the user of such tram rails when laid down, as provided by s. 34, and the maintenance and repair of such tramways, are all personal privileges given to the promoters or their lessees and are not transferable except under the provisions of the Act or some subsequent Act. The Act does provide in itself for leasing, for licensing under s. 35 by the Board of Trade, and for selling these tramways, and so far as I can see it does not provide for any other mode of disposition by the promoters or their lessees. The mere fact that there is in s. 35 an express power to license would make one exceedingly suspicious of any attempt to gain a power of licensing beyond that given by the Act of Parliament. The presumption is that when an express power is given in a case like the present, where there is no other power to dispose of or part with statutory authority, no such other power than that expressed exists. Now here we have an arrangement which was properly entered into by the Eccles Corporation, with the assent of the Board of Trade, with the Salford Corporation. The extent of it is certainly not a transfer of the entire rights and liabilities of the Eccles Corporation under their own Act, for the Eccles Corporation remain under the liability which is imposed by the general Act to repair and maintain, and which they keep to themselves under the express terms of the contract with the Salford Corporation. Inasmuch as all that the agreement purports to give is a lease for thirty-five years to use, work, and run cars upon the tramways

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according to the covenants therein mentioned, subject to the obligation imposed by clause E of the fourth schedule (which immediately precedes clause F) upon the Eccles Corporation as between themselves and the Salford Corporation of maintaining the tramways, I read the words in clause F "the intention of the two corporations being that the Salford Corporation are to have assured to them by the agreed lease (except and save as hereinafter provided) the exclusive use of the tramways" as shewing that there was never any idea of anything more than a personal exclusive use by the Salford Corporation of this particular right under s. 34 of the Tramways Act, 1870, which is expressed to be demised to them. I fail to see how it can be argued that the Eccles Corporation in the face of that have transferred by way of lease to the Salford Corporation that which they had no power to confer except with the assent of the Board of Trade, or how the Salford Corporation can be deemed to have got something which the Board of Trade have not assented to, because it is not expressed in the agreement, and which the Eccles Corporation had not got to give them, namely, the power to make new working arrangements without the consent of the Board of Trade.

In my opinion the whole basis of this legislation with regard to the Tramways Acts rests on the supervision intended to be entrusted to and always exercised by the Board of Trade, and necessarily so for the safety of the public, whose rights on the highways are interfered with by these tramways—it is not merely the people who use the trams, it is also the general public—and I think it would be very unfortunate if any colour was to be given to the suggestion that the use of the word "licence" authorizes evasion of the proper supervision of the Board of Trade.

With regard to Mr. Clayton's argument I see no reason whatever why, having regard to the nature of the interest which the Eccles Corporation have in this tramway, a declaration should not be made in an action to which they are parties, and I think they were properly made parties.

KENNEDY L.J. I agree. It seems to me that the learned judge in the Court below from whom we are differing was

misled by treating the matter as one which could be decided upon such powers as he found to have existed in regard to the lessees and their present licensees, and that he did not sufficiently consider that which seems to me to be the really crucial question, namely, what power there was in the lessors, even if they had wished, without the assent of the Board of Trade, to grant licences indifferently to any one. The fact that the lessees and their licensees may have had a power of contracting, as between themselves, which does not exist in the special Act of the lessors cannot, it seems to me, make right something which the lessors had not under their parliamentary powers a right to do.

Solicitors: *Sharpe, Pritchard & Co., for E. Parkes, Town Clerk, Eccles; Field, Roscoe & Co., for Ayrton, Radcliffe & Wright, Liverpool; Field, Roscoe & Co., for Llewelyn C. Evans, Town Clerk, Salford.*

H. B. H.

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[1909 B. 3911.]

Mortgage—Merger—Subrogation—Payment off by Stranger—Equitable Transfer—Presumption that Security is kept alive—Ignorance of Mortgagor—Agreement by Stranger to take different Security.

Mrs. Rice, the wife of C. L. Rice, was the owner of a leasehold house in Bristol and of property in Cardiff, which were together subject to a charge in favour of a bank to secure 450*l.* and interest, and the title deeds of both properties were deposited with the bank. Mr. Rice asked the plaintiff to lend him 450*l.* for the purpose of paying off the mortgage. The plaintiff thought the mortgaged property belonged to Mr. Rice and did not know of the Cardiff property, and he agreed to advance the money upon having a legal mortgage for 300*l.* on the Bristol property and a guarantee of 150*l.* by Mr. and Mrs. Rice's solicitor, who was to hold the deeds for him in the meantime. Mrs. Rice did not know of this transaction. The money was paid and the deeds of the Bristol property were now in the custody of the solicitor as stakeholder. Mrs. Rice refused to execute a mortgage in favour of the plaintiff, and he brought this action against her, her husband, and the solicitor for a declaration that he was entitled to a charge on the Bristol property for 450*l.* and

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interest. The question was whether the mortgage must be presumed to have been kept alive in the plaintiff's favour :—

Held, on the facts, that it must be presumed that the plaintiff intended to keep the charge alive in his own favour; that the fact that Mrs. Rice, the owner of the mortgaged property, had not requested him to make the payment and did not know of the transaction was immaterial; that the fact that he intended to take a different security did not affect the question; and that he was entitled to a charge on the Bristol property for 450*l.* and interest.

ACTION.

In the early part of 1908 Frances Jane Rice, the wife of Charles Luke Rice, was the owner of certain leaseholds known as 29, Manor Road, Horfield, Bristol, and of property at Cardiff, which were together subject to a charge in favour of the Wilts and Dorset Banking Company to secure the sum of 450*l.* and interest thereon at 5 per cent. per annum. The muniments of title relating to both properties were deposited with the bank. In January, 1908, Mr. Rice asked the plaintiff, Mr. J. B. Butler, to lend him 450*l.* for the purpose of paying off the amount due on the equitable mortgage to the bank. Mr. Butler thought the mortgaged property belonged to Mr. Rice and did not know of the Cardiff property, and he agreed to advance the money upon having a mortgage for 300*l.* on the Manor Road property and a guarantee of 150*l.* by Mr. and Mrs. Rice's solicitor, who was to hold the deeds for the plaintiff in the meantime. The money was paid and the title deeds were now in the custody of the solicitor. Mrs. Rice refused to execute a mortgage in favour of Mr. Butler, and he brought this action against Mr. and Mrs. Rice and the solicitor for a declaration that he was entitled to a charge on the Manor Road property to secure the 450*l.* and interest at 5 per cent.; that if necessary Mrs. Rice and Mr. Rice or one of them should be ordered to execute a legal mortgage to him; foreclosure or sale; a receiver; accounts and inquiries; and that the solicitor might be ordered to deliver up the deeds to the plaintiff and restrained from otherwise parting with them. Mrs. Rice alleged that she was entirely ignorant of the whole transaction, that Mr. Rice owed her 450*l.*, and that she never authorized him to make any arrangements with the plaintiff; she contended that, the money due to the bank having been paid

off, the property now belonged to her free from any mortgage, and that the solicitor held the deeds on her behalf.

The effect of the evidence given at the trial of the action was stated by Warrington J. as follows:—

The position of things at the end of January or the beginning of February was that the Manor Road property was, with other property of Mrs. Rice, subject to a mortgage for 450*l*. C. L. Rice was a builder and he had had building relations for some considerable time with the plaintiff. He was at that time building certain houses on land belonging to the plaintiff at Jubilee Road, Bristol, under a building agreement signed by him in 1904, and had obtained from Butler considerable advances to enable him to proceed with the building under that agreement. On January 30 Rice called upon the plaintiff, and at the very threshold of the case there arose a conflict of evidence between these two men. I have seen them both in the box and I prefer the evidence of the plaintiff, and what I am about to state is what I find as a fact from the plaintiff's evidence. Rice called on the plaintiff and said he wanted an advance of 450*l*. to pay off his indebtedness to the bank, and that the bank held as security the title deeds of his property, 29, Manor Road. He suggested that if the plaintiff would pay off this 450*l*. to the bank he would secure him by giving him a legal mortgage on the house for 300*l*. and would try to obtain a guarantee from his solicitor, who had acted for him in several transactions, for the remaining 150*l*. Nothing was settled at that interview, Butler saying that before he could find the money he would require to be satisfied that the proposed guarantee would be given. The matter rested there for the moment. When Rice asked for the 450*l*. Butler told him that he could not have any money as a further advance in respect of the building in Jubilee Road. The request was therefore simply that he would pay off the equitable mortgage to the bank, and the suggestion was that if he would do that Rice would give him a mortgage and guarantee. Between that first interview and February 1 Rice told Butler that the solicitor would give the guarantee. On February 5 Rice called for a cheque. Butler proposed to draw it in favour of the solicitor in order that the money should

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go through a third party. Rice objected and suggested that the cheque had better be made payable to him, that he would pay off the bank, and that the solicitor would take the deeds and hold them for Butler. That I find to have been the result of the interview. The cheque was accordingly drawn in favour of Rice and was paid to the bank. There was still a small balance due, so the deeds were not obtained on that occasion. Rice asked the solicitor to pay this to the bank and take out the deeds. The latter says that he has no doubt that he knew at that time that the 450*l.* came from the plaintiff. So the deeds were obtained by the solicitor. Some time afterwards he was asked by Mrs. Rice to hand over to her the deeds relating to the Cardiff property, but he still retained those of 29, Manor Road. He said that he understood that he could not give her those deeds without the plaintiff's consent. It is true that there is no evidence that Rice was acting at the request or with the knowledge of his wife. She alleges that he owed her money and she had asked him to repay some of it, and that the 450*l.* was paid by him in this way in part discharge of the debt. She admits that the money came from Butler but says she did not know the circumstances under which he had paid it. So I may take this as a case in which a stranger has paid off a mortgage without the request of the mortgagor. That she knew shortly afterwards there is no doubt, but I think at the time she did not know, and there was no previous request by her to Butler to pay the money into the bank.

The suggested mortgage for 300*l.* and the guarantee for 150*l.* were not carried out because Mrs. Rice would not execute the mortgage, and this action was commenced in November, 1909.

Cave, K.C., and *Owen Thompson*, for the plaintiff. If a stranger pays off a mortgage the Court presumes that it is still kept alive in his favour even though he makes the payment without the knowledge of the mortgagor: *Patten* v. *Bond* (1); *Chetwynd* v. *Allen*. (2) But in the present case the money was advanced by the plaintiff for the express purpose of paying off the mortgage and on condition that he should himself have a charge on the property. Mrs. Rice's ignorance does not entitle her to

(1) (1889) 60 L. T. 583. (2) [1899] 1 Ch. 353.

say that the mortgage is not kept alive in the plaintiff's favour. We are not creating a new charge, but keeping alive an existing one. It makes no practical difference whether we are subrogated to Mr. Rice and have to claim through him.

T. H. Carson, K.C., and *Skelton Cole*, for Mrs. Rice. The plaintiff is not entitled to any charge and our property is discharged from the mortgage. It is not alleged that Mr. Rice acted as our agent, and it is proved that we knew nothing about the transaction. Mortgages are only kept alive under this doctrine where the charge is paid off at the express or implied request of the mortgagor. It has never been decided that the doctrine applies where the mortgagor is ignorant of the transaction. In *Patten* v. *Bond* (1) and *Chetwynd* v. *Allen* (2) persons interested in the equity of redemption knew what was being done and the facts shewed an intention to keep the charge alive. The principle is based upon the supposed intention of the parties. Here there was an express contract which was inconsistent with and excluded an implied agreement to keep alive the mortgage. The plaintiff trusted Mr. Rice and never considered any question of keeping the charge alive. He meant not to keep the existing charge alive, but to take a new and different mortgage, a legal mortgage on different property for a different amount. The plaintiff is not subrogated to the securities held by the bank although their debt was paid by his money: *In re Wrexham, Mold and Connah's Quay Ry. Co.* (3)

H. Terrell, K.C., and *J. G. Wood*, for Mr. Rice. There are no allegations against Mr. Rice and no relief is asked against him in the statement of claim; and as against him the action ought to be dismissed with costs to be paid by the plaintiff.

F. Baden Fuller, for the solicitor. We have simply held the deeds as stakeholder and we take no part in the argument. Our costs ought to be paid by the plaintiff, and he can recover them from the other defendants.

No reply was called for.

WARRINGTON J. The question I have to determine is whether under the circumstances of this case the defendant Mrs. Rice is

(1) 60 L. T. 583. (2) [1899] 1 Ch. 353.
(3) [1899] 1 Ch. 440.

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entitled to hold the Manor Road property discharged from the debt of 450*l.*, not one penny of which she has paid off herself, or whether the person who paid it is entitled to treat the bank's charge as still on foot in his favour. As to the honesty of the case there is no question, and I cannot but say that I think that the defendants Mr. and Mrs. Rice have by their pleadings endeavoured to take advantage of their own deceitfulness to defraud the plaintiff and get the property discharged from this debt. If the law is such that they are enabled to maintain that position they are entitled to do so. [His Lordship stated the effect of the evidence as set out above, and continued.] The statement of claim proceeds on the well-known equitable doctrine that if a stranger pays off a mortgage on an estate he presumably does not intend to discharge that mortgage, but to keep it alive for his own benefit. The statement of claim asks for a declaration that the plaintiff is entitled to a charge on the Manor Road property for 450*l.* and interest at 5 per cent. The charge referred to is the bank's charge, which the plaintiff says was kept on foot in his favour, and the question is whether his position is well founded. In the first place I find from the facts I have stated that it was not the intention of the plaintiff, nor indeed is it possible to suppose that any sensible man would have such an intention, to discharge the property from the debt. There are only two questions which have to be dealt with in order to arrive at the further conclusion that in equity the debt is still kept alive. The first is this: is it material that the owner of the property, the mortgagor, has not requested the person who paid the money to make the payment? and secondly, is the plaintiff's right affected by the further intention that, when the transaction was fully carried out, his position should be secured by a legal mortgage for 300*l.* and a guarantee of 150*l.*? On the first question it should be observed that this is not a case in which a person seeks to create a charge in his own favour. Here there was an existing charge, and the only question is whether it has been paid off or kept alive. On such a question as that it appears to me that the concurrence of the mortgagor is immaterial. Her position is not affected. The only alteration in her position is that instead of owing the

money to A. she will in future owe it to B. I have read the judgment of Kay J. in *Patten* v. *Bond* (1) and of Romer J. in *Chetwynd* v. *Allen* (2), and in my opinion both those judgments are consistent with the view I have expressed, and in particular that of Romer J.; for in the case before him, as in this, the material payment was made without the knowledge and without any communication with the person who was the real owner of the mortgaged property, and, notwithstanding that, Romer J. held that the charge was still on foot. In my opinion, therefore, the equitable mortgage for 450*l.* is still subsisting notwithstanding that it was paid off without the knowledge of Mrs. Rice.

Then does the fact that the plaintiff intended, if the transaction was carried out, to have a legal mortgage on the Manor Road property only and a guarantee for the remaining 150*l.* prevent the application of the doctrine? Plainly not. His meaning was that he should have a further security; but that is no evidence that he intended in the meantime to give up such security as a transfer of the deeds to him would give him. The evidence which he gives, which I find to be true, as to what he said at the second interview supports this, namely, that the deeds were to be taken by the solicitor and held by him for the plaintiff. Such security as that gave would be superseded by the better security to be given afterwards.

Then it is said that the security cannot have been kept alive because, according to the plaintiff's own case, it was only to be kept alive as to a small part of the mortgaged property. I cannot see how that makes any difference. The plaintiff did not know there was any other property; he intended to keep alive the security on the Manor Road property, and that intention was not affected by the fact that the bank also held another security. He is entitled to a declaration that he has a right to a charge on the Manor Road property for 450*l.* and interest at 5 per cent., that being the rate of interest charged by the bank, and to have his security enforced by the usual foreclosure judgment in the case of an equitable mortgage.

That does not quite dispose of the action. The plaintiff made Mr. Rice a defendant. Mr. Rice had no interest in the property,

(1) 60 L. T. 583. (2) [1899] 1 Ch. 353.

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and in the statement of claim no cause of action was shewn against him. What would have been the proper course to pursue if Rice had put in a defence submitting that there was no cause of action against him I do not propose to say. He put in a defence and made certain allegations in support of his wife's case which has failed. He stated that the plaintiff did not become entitled to a charge and that the title deeds ought to be delivered up to his wife. In other words he, who might have stood aside, has chosen to take an active part in the action. Proceedings must be stayed against him, for he is not interested in the judgment I have to pronounce. The only question is whether he should have his costs. In exercise of my judicial discretion I think that when a person who is wrongly made a defendant chooses to be an active litigant in support of another party he is not entitled to say that he ought to have his costs. The proper order will be to stay proceedings against him and make no order as to his costs. The plaintiff is entitled to his costs and to a personal order against Mrs. Rice as a married woman for payment of them. The solicitor has taken the proper course of submitting to the judgment of the Court. He asks me to order the plaintiff to pay him his costs and recover them from the defendants. I do not think that is the modern practice. It is better to order Mrs. Rice, who will ultimately have to pay them, to pay them at once.

Solicitors: *W. H. Newton, for Tuckey & Clifton, Bristol; Gribble, Oddie, Sinclair, Rowlatt & Johnson, for S. L. Usher, Bristol; Indermaur & Brown, for H. Coates, Bristol.*

H. C. R.

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[1909 H. 2750.]

Donatio mortis causa—Subsequent Will—Revocation—Legacy of equal Amount—Satisfaction.

Where a donor has made a donatio mortis causa, the mere fact that he subsequently makes a will by which he gives to the donee a legacy of equal amount does not raise the presumption that the legacy was intended as a satisfaction of the donation.

Testator gave to the plaintiff, who was his housekeeper, certain deposit notes for sums representing in the aggregate 2000*l.* under such circumstances as to constitute a valid donatio mortis causa of the sums thereby represented. Two days later he made a will by which he gave her a legacy of 2000*l.*:—

Held, that the will was not a revocation of the donation, and that, there being no circumstances from which the Court could infer that the testator intended that the legacy should be a satisfaction of the donation, the plaintiff was entitled both to the donation and the legacy.

Jones v. *Selby*, (1710) Prec. Ch. 300, considered.

WITNESS ACTION.

This was an action by the plaintiff against the executors of the will of Thomas Pedder Hudson for a declaration that the delivery to her by Hudson of three deposit notes for sums amounting in the aggregate to 2000*l.* in the circumstances in which the same were handed to her by him constituted a valid donatio mortis causa in her favour of the sums thereby represented.

The facts were as follows: The plaintiff was, and for many years had been, the housekeeper of Hudson, and she had a child by him. In the month of June, 1909, he was very ill, and on the night of June 21 he was so seriously ill that the doctor had to be sent for and it was thought that he would have died. He, however, got a little better, and on the morning of June 22 he called the plaintiff to his bedside and asked her to give him his pocket-book. She gave it to him, and he thereupon took out a bundle of notes and said "Take these, I have always kept them for you in case anything happened to me, but should I get well you will hand them back to me. There are a good many household bills now owing, I expect you to pay them out of these notes. You will only have to apply to the bank manager

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to cash them." The plaintiff took away the notes and put them in a drawer, and kept them till after Hudson's death. No more was said on the subject. Hudson died on June 29 of the illness from which he was suffering on June 22.

On the same day as the donatio mortis causa was made Hudson sent for a solicitor and gave him instructions for a will. Hudson being in a dangerous condition, the solicitor merely jotted them down at the time and subsequently put them into the form of a will, and the will was executed on the same day, that is, June 22. By that will Hudson gave the house in which he lived and certain furniture and a sum of 2000*l.* to trustees upon trust to allow the plaintiff to use the house and furniture during her life with power to the trustees to sell with the plaintiff's consent, and upon trust to invest the 2000*l.* and pay the income to the plaintiff during her life, and on her death to hold the house and furniture and the 2000*l.* upon trust for the plaintiff's son absolutely. That will did not take effect because two days later, namely, on June 24, the testator made a further will. By that will he gave the house and furniture to trustees upon trust for the plaintiff for life and after her death for her son, and then the testator also gave to the plaintiff a legacy of 2000*l.* absolutely, free of legacy duty, and he directed his trustees to pay to her the profits of his business for life so long as it remained unsold, but, should the business be sold in her lifetime, one third of the proceeds of the sale in lieu of the profits of the business. The plaintiff took no interest in the ultimate residue of the estate, which was to be divided between his two sons (thus not including the plaintiff's son).

In the course of the hearing counsel for the defendants tendered evidence of the solicitor who drafted the will and was one of the executors to the effect that the testator in enumerating the items of his estate included therein the deposit notes. Warrington J. refused to admit the evidence.

Cave, K.C., and *C. Church*, for the plaintiff. There is here a valid donatio mortis causa in the plaintiff's favour of the 2000*l.* represented by the deposit notes. It is suggested, however, by the defendants that the donation has been revoked by the

execution of the subsequent will; but that is not so. A donation can no doubt be revoked by the resumption by the donor of the possession of the subject-matter of it. But the mere execution of a subsequent will does not of itself operate as a revocation of the donation. It is further suggested by the defendants that the legacy of 2000*l.* given to the plaintiff by the will was a satisfaction of the donation. But the presumption of satisfaction arises only in two cases, namely, either where a legacy is given to a child by its parent or by a person who stands in loco parentis or where it is given to a creditor by his debtor. Here the plaintiff was neither a child nor a creditor of the testator, and therefore the presumption does not arise. In *Jones* v. *Selby* (1), upon which the defendants will no doubt rely, there was no valid donatio mortis causa.

[WARRINGTON J. In that case the Court appears to have held that the testator intended to satisfy the previous gift by the particular legacy.

H. Terrell, K.C. That case was explained by Lord Hardwicke in *Ward* v. *Turner*. (2)

WARRINGTON J. In *Ward* v. *Turner* (2) the only question which Lord Hardwicke was considering was the necessity of delivery. I do not think he was considering *Jones* v. *Selby* (1) at all.]

The point as to whether a donatio mortis causa is avoided by the fact that a will or codicil is subsequently made is suggested in the head-note to *Hambrooke* v. *Simmons* (3), but is not referred to in the judgment, and it appears from the record of the case that on a subsequent occasion the jury found that there was no valid donation. In *In re Kirkley* (4) Joyce J. appears to have treated the question of revocation as open, but the case was decided upon another ground. It is submitted, therefore, that the donation was not revoked by the will nor satisfied by the legacy, and that the plaintiff is entitled to both the donation and the legacy. [They also referred to *Johnson* v. *Smith* (5) and Williams on Executors, 10th ed. p. 600.]

H. Terrell, K.C., and *F. C. Watmough*, for the defendants.

(1) Prec. Ch. 300.
(2) (1752) 2 Ves. Sen. 431, 441.
(3) (1827) 4 Russ. 25.
(4) (1909) 25 Times L. R. 522.
(5) (1749) 1 Ves. Sen. 314.

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The law as to donationes mortis causa, which is based on the civil law, is still in an uncertain state, and it is sometimes difficult to reconcile the old with the more recent decisions. A donatio mortis causa is said in many respects to resemble a legacy; for example, it is revocable at the will of the donor and it is not necessary that the revocation should be communicated to the donee. The origin of the doctrine of donatio mortis causa was to enable a person to make a valid disposition when he could not make a will. If then a person having made such a disposition subsequently makes a will by which he gives to the donee a legacy of equal amount he must be presumed to have intended that the legacy should be in satisfaction of the prior gift: *Jones* v. *Selby* (1); Roper on Legacies, 4th ed. p. 24. In such a case the presumption is that the testator did not intend that the donee should have both the donation and the legacy, but that the latter should be in substitution for the former.

WARRINGTON J. The question in this case is whether the plaintiff is entitled to three deposit notes, representing the principal sum of 2000*l.*, which formed part of the estate of Thomas Pedder Hudson. The plaintiff claims the amount represented by the notes as a donatio mortis causa made to her by Hudson. The facts are very simple. [His Lordship stated the facts as above set forth, observing that under the circumstances it was quite clear that there was a valid donatio mortis causa of the money represented by the deposit notes. He continued:—]

It is said that the gift of the 2000*l.* by the will was in satisfaction of the donatio mortis causa. It was suggested that the will itself was a revocation of the gift, but this was not insisted on, and I think there is no foundation upon authority for saying that the mere subsequent execution of a will is in itself a revocation of a donatio mortis causa. But it is said that the legacy of 2000*l.*, being of the same amount as the principal money represented by the notes which were the subject of the donatio mortis causa, must be taken as a satisfaction of the donation. There is no authority on the point except *Jones* v. *Selby* (2), decided by Lord Chancellor Cowper. It was a somewhat

(1) Prec. Ch. 300.

(2) Prec. Ch. 300, 304.

peculiar case. There the testator had given a legacy of 500*l.* to his housekeeper. Subsequently, according to the plaintiff's evidence, he delivered to her a hair trunk and all that was contained in it without telling her what was in it, and which was subsequently found to contain, among other things, a tally upon the Government for 500*l.* Three years afterwards he made another will, by which he in substance revoked all previous wills, and he thereby gave her a legacy of 1000*l.* The plaintiff claimed the legacy of 1000*l.* and in addition the 500*l.* represented by the tally contained in the box. The matter came before the Lord Chancellor, who held on the evidence that there was no donatio mortis causa at all of the money represented by the tally for the reason that the plaintiff had failed to prove that the tally was in the box at the time when it was given to her by the testator. It was therefore unnecessary for the Lord Chancellor to go further into the matter, but nevertheless he did so. The report of the judgment proceeds: "As to the second point, whether the will were not a revocation, he said, it could not be properly called a revocation; but the 1000*l.* therein given should be looked upon as a satisfaction of the 500*l.* given her by the first will, and the 500*l.* tally after that. One cannot be said to revoke a debt by his will, but yet he may satisfy it, by giving a legacy of equal value; and since he had revoked all former wills, this 1000*l.* was a satisfaction equivalent to a revocation, and must go in recompence of the 1000*l.* he had before intended for her, since she could not prove he intended it otherwise." That is the only authority for the proposition contended for by the defendants. Does that case lay down the general principle that, if a person makes a donatio mortis causa and afterwards gives to the donee a legacy of the same amount, the legacy must be presumed to be in satisfaction of the donation? The proposition contended for by the defendants must go so far as that. There is no authority which lays down the proposition in those terms; it is not even to be found in the text-books. All that the text-books say is that a legacy may be a satisfaction of a donatio mortis causa. So it may be, if the Court comes to that conclusion—that it was intended so to be. But in my opinion there is no authority to support the proposition that the mere fact of a legacy being given of the same amount as the donation raises the

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presumption that the legacy is a satisfaction of the donation. I do not see why it should be a satisfaction. The testator intends the donee to have the donation (whatever happens) in case he dies, unless he recalls it. If he subsequently gives the donee a legacy of the same amount, why is the Court to be driven to conclude that the testator intended the donee not to have both the donation and the legacy? The testator knows that he has made the donatio mortis causa. Why should he not intend the donee to have both the legacy and the donation? I can see no reason at all.

Now let me examine *Jones* v. *Selby* (1) and see whether it is an authority for the proposition contended for. I think what the Lord Chancellor meant in that case was that the legacy there was intended to be in satisfaction of the previous provision made. It is important to bear in mind that he relies on the fact of 500*l.* having been given by the previous will, that he relies on the express terms of the second will revoking all previous wills, and that he relies also on the fact of the legacy being of the same amount as that given by the first will and the tally together, and looking at all the circumstances he thought the legacy was intended by the testator to be a satisfaction of the previous gift. The case was a very short one, and I do not think, judging from the report, that I can say that it ought to be treated as an authority for the general proposition that a legacy of equal amount to a donatio mortis causa is in itself a revocation of the donation. Of course, as I have said, it may be. I think in a case where the doctrine of double portions applies it may be. So also, if the donation is made in satisfaction of the debt of a creditor and subsequently a legacy of equal amount is given to that creditor, then the legacy may be in satisfaction of the donation. But I do not find any authority for the proposition that the mere fact of a legacy being given of an amount equal to a previous donatio mortis causa is itself a revocation of the donation, and in this case I can find no circumstances which will lead me to conclude that the testator intended that the legacy should be in satisfaction of the donation. I hold, therefore, that the plaintiff is entitled to a declaration that she is entitled to receive the 2000*l.* represented by the notes, subject, of course,

(1) Prec. Ch. 300.

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to her paying out of it what the deceased called his household bills.

There is only one other point to which I need refer. It was stated that the testator in instructing his solicitor to make his will enumerated his assets and included therein the deposit notes, and it was proposed to give this statement in evidence. I declined to admit it. Even if I had admitted it, it would not have carried the matter any further, for in one important sense the deposit notes were a part of his estate and the executors would have had to include them in their executorship accounts for purposes of duty. It was therefore natural that in talking with one of his future executors the testator should refer to the notes.

Solicitors: *Lovell, Son & Pitfield, for Paris, Smith & Randall, Southampton; Allen, Edwards & Oldfield, for Robert Druitt, Bournemouth.*

W. I. C.

PARKER J.
1910
May 12, 13.

In re WENIGER'S POLICY.

[1910 W. 215.]

Insurance—Life Policy—Mortgages—Priorities—Notice.

Where a person lends money on the security of a policy of life assurance which is not handed over to him, he has, if it is in the hands of a prior mortgagee, constructive notice of the prior mortgage, and cannot obtain priority by giving notice to the assurers before the prior mortgagee gives notice.

Spencer v. *Clarke*, (1878) 9 Ch. D. 137, followed.

A mortgagee of a life policy is not under any obligation to give notice of his mortgage to a prior mortgagee of whose security he has notice, and if the latter makes further advances to the mortgagor in pursuance of a fresh bargain and a further charge, the security in respect of the further advances has not priority over that of the subsequent mortgagee if he gives prior notice to the assurers.

Quære whether the prior mortgagee would have priority in respect of his further advances if they were made, without notice of a subsequent mortgagee's security, under a contract for security for a present advance and further sums to be advanced.

P. F. L. WENIGER had a policy, dated December 27, 1892, by which the Royal Insurance Company assured payment to him, if

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alive on November 20, 1909, or to his executors, administrators, or assigns on proof of his death, of 750*l.*, with certain additions, the annual premium being 48*l.* 16*s.* 3*d.*

Weniger created several charges on the policy which were as follows:—

December 20, 1897, December 13, 1899, and September 30, 1902, mortgage by deposit with the insurance company, accompanied by a memorandum of deposit, and further charges, to secure sums amounting in all to 250*l.* with interest.

July 14, 1905, memorandum of charge, expressed to be subject to the insurance company's charge (said to be for 240*l.*) to secure to E. B. Kapp 146*l.* 18*s.* and interest.

September 1, 1905, charge (not referring to any other charge) securing to the Metropolitan Credit Company 115*l.* and interest.

November 27, 1905, charge to the Indo-European Telegraph Company to secure 600*l.* and interest. This sum included 250*l.* and interest paid to the insurance company by the telegraph company, to which the policy and original memorandum were handed. The telegraph company in 1907 and 1908 paid premiums on the policy amounting to 115*l.* 18*s.* 7*d.*

April 30, 1906, memorandum of charge to Kapp to secure a further sum of 73*l.* and interest.

May 9, 1906, charge (expressed to be subject to the first charge for 250*l.*) to A. S. Cohen to secure 250*l.* and interest.

May 25, 1906, charge (expressed to be subject to the original charge for 250*l.*) to one Ramsay.

Notices of the charges were given to the insurance company as follows:—August 21, 1906, by the Metropolitan Credit Company; August 29, 1906, by Ramsay; August 31, 1906, by Kapp in respect of both his charges; September 3, 1906, by Cohen; September 10, 1906, by the telegraph company.

Weniger was alive on November 20, 1909, and the insurance company paid into Court under the Life Assurance Companies (Payment into Court) Act, 1896, the moneys assured by the policy, which amounted to 780*l.*

Ramsay took out a summons, to which the Metropolitan Credit Company, the Indo-European Telegraph Company, Kapp, and Cohen were the respondents.

Van Neck, for Ramsay. The telegraph company comes first, but only as to the 250*l.* and the premiums paid by it. Next comes the Metropolitan Credit Company, as it was the first to give notice. Ramsay comes in next, as he gave notice before the other incumbrancers.

Clauson, for the Indo-European Telegraph Company. The telegraph company comes first in respect of all its advances and the premiums, which in the aggregate are more than sufficient in amount to exhaust the fund in Court.

As regards the 250*l.* paid to the insurance company, the telegraph company is entitled to stand in its shoes. It is also entitled to repayment of the premiums paid by it.

A person advancing money on the security of a policy which is not shewn to him has constructive notice of any security of the person in possession of it, although the second incumbrancer first gives notice to the office: *Spencer* v. *Clarke*. (1)

The prior incumbrancer is also entitled to priority in respect of further advances made after the date but without notice of the second charge: *Bedford* v. *Backhouse* (2); *Calisher* v. *Forbes*. (3) If he makes further advances, having at the time notice of a subsequent charge, his further advances rank after the charge: *Hopkinson* v. *Rolt*. (4)

In the present case neither the insurance company nor the telegraph company had notice of the charge of the Metropolitan Credit Company, and the telegraph company has priority over that company.

All the advances of the telegraph company have priority also over the charges of the other incumbrancers although their notices are prior in date. They ought to have given notice to the telegraph company, which until it received notice could safely make further advances. Kapp's first charge was expressly made subject to the insurance company's charge, now belonging to the telegraph company, and as he did not give notice to either company before the latter company's further advances, those advances rank for security before his. Nor can Kapp in respect of his second charge, or Cohen or Ramsay, having regard to their

(1) 9 Ch. D. 137.
(2) (1730) 2 Eq. C. Ab. 615.
(3) (1871) L. R. 7 Ch. 109.
(4) (1861) 9 H. L. C. 514.

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notice of the first charge, obtain priority over the telegraph company's further advances by giving notice, before that company did, to the insurance company. [He also referred to *Taylor* v. *Russell* (1); *Taylor* v. *London and County Banking Co.* (2)]

Martelli, K.C., and *Arthur Sims*, for the Metropolitan Credit Company. A second mortgagee of a chose in action is not bound to give notice of his security to the first mortgagee. In the case of a policy, whatever may be the dates of the charges, the chargee who first gives notice to the insurance company obtains priority: *In re Lake.* (3) [They also referred to *Ward* v. *Duncombe.* (4)]

Christopher James, for Kapp. Kapp had notice of the insurance company's charge, which was the only one in existence when he made his first advance. *Spencer* v. *Clarke* (5) is no authority to shew that Kapp is fixed with notice of any charge which he would not have discovered by inquiring of the insurance company when he made his first advance.

Ward Coldridge, for Cohen.

PARKER J. This case raises certain questions as to the distribution of a small fund in Court, as to which there are many claimants, and which has been paid into Court under the Life Assurance Companies (Payment into Court) Act, 1896. Of course the insurance company had sufficient notice of its own charges. But none of the other charges were notified to that company at the times when they were given. Weniger having got into difficulties, there was rather a rush to give notice, and in order of notice the Metropolitan Credit Company comes first, Ramsay second, Kapp third, Cohen fourth, and the telegraph company last. The question is how the money should be distributed.

It is clear that in the case of choses in action, such as policies, the priorities of equitable incumbrancers are determined, in default of their gaining priority by giving notice, by the order of the dates of their charges. It is equally clear where there is

(1) [1892] A. C. 244.
(2) [1901] 2 Ch. 231.
(3) [1903] 1 K. B. 151.
(4) [1893] A. C. 369.
(5) 9 Ch. D. 137.

a trustee or other person to whom notice can be given, which has the effect of restraining him from parting with the money in his hands, priority is prima facie determined by the order of notice.

But on principle, and on the authority of *Spencer* v. *Clarke* (1), I think it is clear that a mortgagee who gives such a notice cannot thereby gain priority in charge over an incumbrance prior in point of time of which he had actual or constructive notice at the time when he advanced his money.

In the present case I think that, having regard to the principles I have mentioned, the telegraph company is entitled to stand as first incumbrancer on the policy and in the shoes of the insurance company in respect of the 250*l.* paid to that company, and that the telegraph company has also priority over the other incumbrancers in respect of the premiums paid to keep up the policy, as the payment of these was for the benefit of all parties and would be allowed in a mortgagee's account.

But the telegraph company also claims to be entitled to priority over all the other incumbrancers in respect of the further advances made by that company on the ground that the policy was throughout in the possession of the telegraph company or its predecessors in title, and therefore that the telegraph company was justified, in the absence of notice of subsequent incumbrances, in making further advances on the policy. If the original contract between the mortgagor and the mortgagee had been for a security for a present advance and any further advances, I am not sure that *Calisher* v. *Forbes* (2) would not have applied, and that further advances, without notice of subsequent charges, would not have priority over them by virtue of the original security. But the case is different when the later advances are made on a new bargain and are not secured by the original but by a new security. The telegraph company cannot claim priority for more than the 250*l.* and the premiums paid by them unless it can shew that there was a duty on the other incumbrancers to give the telegraph company notice and that it is in a worse position than if such notice had been given to it.

(1) 9 Ch. D. 137. (2) L. R. 7 Ch. 109.

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Where a chose in action is concerned a mortgagee must give notice to the debtor for his own protection, but there is no principle establishing that subsequent incumbrancers of a policy are bound to give notice to prior incumbrancers. If the first mortgagee makes a further advance on a fresh bargain he must inquire at the office whether notice of another charge has been received, and if not he may complete his security by giving notice of it. The telegraph company, in my opinion, is entitled to come first only in respect of 250*l.* and the premiums.

The Metropolitan Credit Company comes second, and then some difficulty arises. Ramsay would have come next, as he was the second to give notice, but he is postponed because when he advanced his money he made no inquiry as to the policy, whereas if he had inquired whether the insurance company had the policy he would have found that the telegraph company had it and that it was charged to that company for 600*l.*

Then comes Kapp as to his original charge. In my opinion he had no constructive notice altering his position, for when he made his first advance the telegraph company had not advanced anything, and on inquiry he would only have found that 250*l.* was already secured. But as to his second charge, which was after that of the telegraph company, he must be postponed on the principle of *Spencer* v. *Clarke* (1), as he was put on inquiry as to the policy itself, and would have ascertained the true facts if he had made inquiry.

Next comes Cohen, who is also postponed on the same principle, and last of all, in order of notice, comes the telegraph company, which has priority over Cohen's charge, Kapp's second charge, and Ramsay's charge on account of the doctrine of *Spencer* v. *Clarke.* (1)

There is some difficulty in working out the order of payment, as Ramsay comes before Kapp but after the telegraph company, whereas Kapp comes before the telegraph company's further advances in respect of his first charge.

In my opinion the proper order of payment will be as follows:

(1.) Pay the telegraph company the 250*l.* and the premiums.

(1) 9 Ch. D. 137.

(2.) Pay the Metropolitan Credit Company.

(3.) Out of what is due to Kapp on his first charge pay Ramsay what is due to him on his security.

(4.) If anything remains pay it to Kapp on account of his first charge.

(5.) Pay to the telegraph company what is due to it beyond the 250*l.* and premiums.

(6.) Pay Kapp an amount equal to the amount paid to Ramsay.

(7.) Pay Kapp what is due to him on his second charge.

(8.) Pay Cohen what is due on his charge.

Solicitors: *T. L. Yates; Bristows, Cooke & Carpmael; G. E. Hodgkinson; W. F. Oscar Edmonds; Arthur Benjamin & Cohen.*

F. E.

WEATHERBY & SONS *v.* INTERNATIONAL HORSE AGENCY AND EXCHANGE, LIMITED.

[1909 W. 3546.]

Copyright—Infringement—Injunction—List of Brood Mares—Competition—Damage.

The plaintiffs published in the "General Stud Book," a fresh volume of which appeared every four years, lists of all the thoroughbred brood mares at the stud in Great Britain. These volumes were entered and registered at Stationers' Hall. The defendants compiled a book called "Bruce-Lowe Figures to Stud Book, Vol. 21," which contained, without the plaintiffs' permission, practically the whole of the list of brood mares published in vol. 21 of the Stud Book. The plaintiffs brought an action for an injunction restraining the defendants from infringing their copyright. The defendants alleged that they had a right to make use of the list in question, and that their book would be sure to benefit the plaintiffs by increasing the sale of the Stud Book:—

Held, that the lists were not such bare lists of names as to be incapable of copyright; that an unfair use might be made of one book in the preparation of another even if there was no likelihood of competition between the former and the latter; that an action to restrain infringement of copyright would lie though no damage was shewn; and that the plaintiffs were entitled to succeed in the action.

THIS was an action for an injunction restraining the defendants from printing, publishing, or selling any copy of a book entitled "Bruce-Lowe Figures to Stud Book, Vol. 21," containing any passages copied or colourably altered from the "General Stud

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Book" published by the plaintiffs; an inquiry as to damages or an account of profits; and delivery up of all copies of the defendants' book. The following is that part of the judgment of Parker J. which states the facts.

The chief object of the Stud Book, a fresh volume of which appears every four years, is to afford complete information as to all matters affecting the pedigree of every thoroughbred horse or mare in the kingdom, a thoroughbred horse or mare being one which descends on both sides from one or another of certain original well-known stocks. Each volume consists of three sections. In the first or chief section there is a list, alphabetically arranged, of brood mares with their produce. Every thoroughbred mare, if and as soon as she is used for breeding, finds a place in this list, and remains in this list until all possible information as to herself or her foals, bearing on questions of pedigree, has been exhausted. Thus in the case of every mare appearing in this list there is a statement of her dam and sire, when and by what stallion she has been covered, and with what result, together with particulars of every thoroughbred colt or filly of which she has been the mother, the date of its birth, its colour, its name as registered with the Jockey Club, and, if a colt, whether or not it has been gelded. As soon as all this information is complete, and the mare is either dead or put out of stud, her name is dropped from the list. The fact that a mare is in this list shews that she has recently been or is being used for breeding purposes, and that there yet remains something to be learned as to herself and her produce, bearing on matters of pedigree, beyond what is contained in any previous volume. Considerable labour is expended, and considerable expense incurred, in the publication of this list, and in obtaining and verifying the information given under the head of each mare; and in collecting this information the editors have the advantage of the reputation they have gained by the publication of previous volumes, every owner of thoroughbred brood mares or stallions being naturally anxious that his mares or stallions, as the case may be, shall appear in the Stud Book, and that the information given about them shall be correct and up to date. The second section of each volume of the Stud Book consists of a list of thoroughbred horses and

mares sent abroad, and of the countries to which they have been sent. The third section consists of an additional list of brood mares, arranged under their sires, whose names are in alphabetical order. It adds nothing to the information given in section 1, but is convenient for purposes of reference.

The circumstances which have given rise to this action are as follows. In 1895 there was published a posthumous work of the late C. Bruce-Lowe, edited by Mr. W. Allison, and entitled "Breeding Racehorses by the Figure System." Bruce-Lowe grouped all thoroughbreds under their original stocks or tap-roots, tracing descent through the females only, and, having after many years of research ascertained the number of successes by members of each group or family in the Derby, the Oaks, and the St. Leger, gave each group or family a number indicating its order of merit judged by those successes. He further investigated the relative efficiency of stallions in each group or family, and found that only one of the first five most successful racing families, namely, that numbered 3, shewed any high degree of such efficiency, the other groups or families in which there was a high degree of such efficiency being those numbered 8, 11, 12, and 14. To mark this fact he distinguished those five groups or families by giving their numbers in thick type, the numbers of the other groups or families being given in ordinary type. Thus the Bruce-Lowe family number of any horse or mare indicates to all persons who are conversant with the Bruce-Lowe system the order of merit, qua success, in the Derby, the Oaks, and the St. Leger, of the family or group to which such horse or mare belongs, and if the number is in thick type it indicates also that this family is one in which the stallions have in the past exhibited a high degree of efficiency. Inasmuch as the hereditary factor in horse breeding is universally acknowledged, ready access to the Bruce-Lowe numbers must be of considerable use to all horse breeders and racing men. Access to the Bruce-Lowe family numbers can be obtained by means of the tables of Hermann Goos, a new revised and enlarged edition of which was published a few years ago and contains the names and the Bruce-Lowe family numbers of all thoroughbred horses and mares up to 1907. It is, however, necessary to trace back

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the pedigree of any horse or mare whose number is now required through the female line to some mare appearing in these tables, the number of such last-mentioned mare being, of course, the required number. But besides the labour involved in this, the Hermann Goos tables are cumbrous and costly, and contain far more information than the breeder or racing man, who is considering, it may be, by what stallion a particular mare shall be covered, or the chances of success of a particular horse on the Turf, or is a buyer at the annual Newmarket sales, is likely to want. The mares and stallions as to whose family numbers the horse breeder or racing man is most certain to want information are undoubtedly those whose names appear in the first section of the Stud Book, and accordingly the editors of the Stud Book have more than once been asked to indicate those numbers in the Stud Book against the name of each mare or stallion, as is done, I understand, in some foreign publications of a similar nature. The editors have not at present seen their way to adopt this course, and in order to meet an undoubted demand on the part of breeders and racing men the defendants have compiled and published the book which is complained of as an infringement of the plaintiffs' copyright, and which is entitled "Bruce-Lowe Figures to Stud Book, Vol. 21."

The first section of the defendants' book purports to contain an alphabetical list of all brood mares appearing in the first section of vol. 21 of the Stud Book, together with the Bruce-Lowe family number of each mare and the name and family number of her sire. The third section of the defendants' book purports to contain an alphabetical list of all sires who appear in vol. 21 of the Stud Book as having daughters at the stud, together with the Bruce-Lowe family number of each sire. Thus the first section of the defendants' book corresponds with the first section of vol. 21 of the Stud Book, and the third section with the third section of that volume.

The way in which the defendants' book was compiled appears to have been as follows. The alphabetical list of mares in the first section of vol. 20 of the Stud Book, with their sires, and the alphabetical list of sires contained in the third section of vol. 20 of the Stud Book were taken as the basis to work upon.

These lists were to some extent revised with reference to information appearing in certain supplements to vol. 20 which the editors of the Stud Book publish annually, and with reference also to information gleaned from sporting papers or by directors or officers of the defendant company while visiting private stud farms or attending sales of thoroughbreds. The lists as so revised were typed or proofed with the Bruce-Lowe number set against the name of each mare or stallion. Then, as soon as vol. 21 of the Stud Book was published, the typed or proofed lists were compared with the first and third sections of that volume, and names added or deleted, for the most part according to whether such names did or did not appear in vol. 21 of the Stud Book. The defendants, however, omitted from their lists a considerable number of mares whose names appear in section 1 of vol. 21, because, as I gather, they thought that, for one reason or another, the family numbers of such mares were not likely to be required by the persons for whom their book was intended. But for this, and also but for the fact that here and there the defendants' lists contain a name which is not in vol. 21, these lists would be, as they purport to be, identical with the list of brood mares in section 1, and the list of stallions in section 3, of vol. 21 of the Stud Book. The extent to which the defendants made use of vol. 21 is shewn by the fact that six-sevenths of the names in the first section of vol. 21, and not in the first section of vol. 20, were added to the defendants' lists from vol. 21, and I do not think I should be far wrong in saying that a similar proportion of the mares mentioned in the first section of vol. 20 but not in the first section of vol. 21 have been deleted from the defendants' list because they do not appear in the first section of such last-mentioned volume. In other words, it would appear that by their use of vol. 21 of the Stud Book the defendants have been saved six-sevenths of the labour and expense they would have incurred if, starting on the basis of vol. 20 of the Stud Book, they had prepared sections 1 and 3 of their book without using vol. 21 at all.

A. J. Walter, K.C., and *R. Moritz*, for the plaintiffs. The defendants ought not to be allowed to infringe our copyright in

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this way. We have prepared these lists with great labour and expense, and the information contained in them is official and special; they are literary productions and a good subject of copyright. The defendants have employed no independent research and have simply copied our book: *Kelly* v. *Morris* (1); *Scott* v. *Stanford* (2); *Ager* v. *Peninsular and Oriental Steam Navigation Co.* (3); Copyright Act, 1842 (5 & 6 Vict. c. 45).

Romer, K.C., and *Ashton Cross*, for the defendants. We have only taken the lists and used them for the purposes for which they were intended to be used, and, whether the rest of the Stud Book be good subject-matter of copyright or not, these lists of names cannot be protected under the statute. The plaintiffs are suing on vol. 21 of the Stud Book only, whereas we took our lists from vol. 20, the annual supplements published subsequently, and from public sources. We are entitled to make use of these lists to get the names of the mares and then to add our own information to them. That information is not given in the Stud Book. It is permissible to take the names out of a directory and use them for another purpose which does not compete with the directory: *Morris* v. *Wright*. (4) The Stud Book is a scientific work published for the purpose of supplying information to persons engaged in scientific problems and persons engaged in buying horses, and these lists are not of the essence of it. None of them would buy our book to take the place of the Stud Book. It does not compete with the Stud Book, and the publication of it must have the effect of increasing the sale of the Stud Book. In order to succeed the plaintiffs must shew that they will be damaged by the sale of our book, and they cannot do that. If the nature and object of the selections we have made from the Stud Book are considered it is obvious that we have not made an unfair use of the plaintiffs' work: *Wilkins* v. *Aikin* (5); *Cary* v. *Kearsley* (6); *Folsom* v. *Marsh*. (7)

A. J. Walter, K.C., in reply.

Cur. adv. vult.

(1) (1866) L. R. 1 Eq. 697.
(2) (1867) L. R. 3 Eq. 718.
(3) (1884) 26 Ch. D. 637.
(4) (1870) L. R. 5 Ch. 279.
(5) (1810) 17 Ves. 422.
(6) (1803) 4 Esp. 168.
(7) (1841) 2 Story (Amer.), 100, 107.

June 9. PARKER J. stated the facts as set out above and continued :—The real question is whether, having regard to the copyright in vol. 21 of the Stud Book, the defendants were at liberty to use this volume in the way and to the extent to which they have used it, and I may say at once that, having regard to the little original work done by the defendants, compared with the large amount of work they have been saved by the use of vol. 21, they are, in my opinion, in no better position than they would have been if their lists of mares and stallions had been taken wholly from vol. 21. The object of the defendants' book is, as I have said, to enable horse breeders and racing men to find readily and without expense or delay the Bruce-Lowe family numbers of all horses and mares whose numbers may be of use to them in considering questions arising in the exercise of their respective callings. The task of a person proposing to prepare such a book would consist, first, in discovering and preparing a list of the various horses and mares whose family numbers would be most certain to be required by the persons for whom the book was intended, and, secondly, in finding the family numbers of the horses and mares in this list. The latter part of the task would be comparatively easy, but the former would involve, if there were no recently published volume of the Stud Book, exhaustive inquiries from the 1400 or 1500 breeding establishments in this country, for obviously the list would have to include all mares now or recently at the stud, with their sires. A person who had already made a list of mares now or recently at the stud, and their sires, would have performed more than half of the task involved in the preparation of such a book as the defendants'. By utilizing the Stud Book lists the defendants have, in fact, saved themselves the labour and expense which would have been involved in preparing such lists by means of researches of their own, and, if they were entitled to do this, it follows that the editors of the Stud Book, had they desired to publish the Bruce-Lowe numbers of the mares and stallions appearing in vol. 21, would, in spite of the labour and cost of preparing up-to-date lists of such mares and stallions, be in no better position to do so than any other of His Majesty's subjects.

It is said that there can be no copyright in a mere list of

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names, and this may be true where the list of names conveys no useful information whatever, because to support every copyright there must be an element of literary value. It may also be true in the sense that every one who by original work compiles some list may publish it as an original list of his own, but it is equally certain that, if the list be the subject of copyright at all, no one is entitled in compiling a like list to save himself the trouble of original work by copying an already existing list, the copyright of which belongs to another. I do not think that the list of mares in the twenty-first volume of the Stud Book, with their sires, or the list of stallions with daughters at the stud contained in the same volume, are in fact mere useless lists of names in which there can be no copyright. On the contrary, the fact that a mare is in the one list informs every one that she is now or has recently been at the stud, and the fact that a stallion is in the other list shews that he has had daughters who are now or were recently at the stud, and this information may be valuable for various purposes beyond the purposes for which the defendants have used it. For example, suppose a buyer with these lists in his hand attending the 1907 annual Newmarket sale, the catalogue of which was put in evidence, takes lot 133, describing Wapentake, a bay stallion, born 1900, by Chittabob (son of Robert the Devil) out of Dame Quickly, by Galopin out of Primrose Dame, by Barcaldine out of Lady Rosebery, by Lord Clifden. I think it eminently likely that the intending buyer, attaching, as he would do, importance to the hereditary principle, might be greatly influenced by knowing that Chittabob, Robert the Devil, Galopin, Barcaldine, and Lord Clifden still had daughters now or recently at the stud, and the number of such daughters, and that Dame Quickly was still at the stud, all which information he would obtain from the lists in question. Instances of this sort might be indefinitely multiplied. In my opinion, therefore, the lists in question are not such bare lists of names as to be incapable of copyright.

Then it is said that the real and only test as to whether or not the defendants have made an unfair use of vol. 21 of the Stud Book lies in the answer to the question whether there will be any competition between such volume and the defendants'

book. It is no doubt true that where, as is often the case, it is a difficult matter to determine whether in preparing one publication an unfair use has been made of another, the nature of the two publications and the likelihood or unlikelihood of their entering into competition with each other is not only a relevant but may be even the determining factor of the case. But, in my opinion, an unfair use may be made of one book in the preparation of another, even if there is no likelihood of competition between the former and the latter. After all copyright is property, and an action to restrain the infringement of a right of property will lie even if no damage be shewn. In the present case there may not be much probability that any one will buy the defendants' book instead of vol. 21 of the Stud Book, but the fact remains that in preparing this book the defendants have utilized, wholesale and without permission, lists prepared by the plaintiffs at much trouble and expense. In so doing they have appropriated the result of this labour and expense to their own use, and even if they have injured the plaintiffs in no other way, they have at any rate deprived them of the advantage, which their copyright conferred on them, of being able to publish such a book as the defendants' book at much less labour and expense than any one else. That this consideration is relevant appears from the case of *Bradbury* v. *Hotten.* (1)

In my opinion, therefore, the plaintiffs are entitled to succeed in the action. I ought to add, however, that the defendants have throughout acted in the matter with entire bona fides, though they have taken an erroneous view of the law, and under those circumstances I may perhaps express a hope that arrangements can be made under which it will not be necessary to stop the sale of a book which, though it infringes the plaintiffs' copyright, was published bona fide and without any animus furandi, and which on the evidence is a useful book, and one which meets a genuine demand on the part of horse breeders and racing men.

Solicitors: *Peachey & Co.; T. H. Hiscott.*

(1) (1872) L. R. 8 Ex. 1.

H. C. R.

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WILSON *v.* KELLAND.

[1909 W. 68.]

Company—Debentures—Future Property — Floating Charge — Trust Deed—Restriction against Creation of Prior Mortgages—Purchase by Company—Purchase-money to remain on Mortgage—Vendor's Lien—Legal Mortgage—Priority—Registration of Debentures—Companies Act, 1900 (63 & 64 *Vict.* c. 48), *s.* 14—*Constructive Notice—Extent—Second Mortgage—Notice—Power of Company—Postponement.*

On the sale of freehold property to a company in 1904, the vendors agreed to let part of the purchase-money remain on mortgage. The conveyances to the company were executed, but remained in the custody of the vendors' solicitor, and subsequently on January 27, 1905, the mortgage deed was executed without investigation or inquiry on the part of the vendors as to the company's title and without notice of any debentures or trust deed. In 1901 the company had issued debentures secured by a trust deed, particulars whereof had been duly registered pursuant to s. 14 of the Companies Act, 1900. Both the trust deed and the debenture charged the undertaking of the company and all its present and future property by way of a floating charge in the usual manner, and both prohibited the creation of any charge on such property ranking in priority to or pari passu with the security created in favour of the debentures, but the conditions indorsed on the debenture, a form of which was scheduled to the trust deed, provided that nothing "herein" contained should prevent the creation of specific mortgages upon after-acquired freehold or leasehold property.

On June 7, 1906, the plaintiff, with notice of the debentures and trust deed, took a mortgage from the company upon the same premises but subject to the mortgage of January 27, 1905, which was afterwards transferred to him. In a foreclosure action:—

Held, as to the mortgage of January 27, 1905, that, whether the vendors had or had not notice of the trust deed and debentures, any equity that attached to the purchased property in favour of the debenture-holders or trustees was subject to the paramount equity of the unpaid vendors, and that the mortgage took priority over any charge to persons claiming through the company.

If the priority had turned upon the question of notice, the particulars registered pursuant to s. 14 of the Companies Act, 1900, would have amounted to constructive notice of a charge affecting the property but not of any special restrictions upon dealings by the company with its property in the usual manner when the subsisting charge is a floating security.

Held, as to the mortgage of June 7, 1906, that the security created by the trust deed and the debenture was cumulative; that the former

was not controlled by the proviso in the conditions indorsed on the debenture; and that the company had no power to create this mortgage in priority to the trust deed.

WITNESS ACTION.

On March 5, 1901, the defendants the Bedford Brewery (Plymouth), Limited (hereinafter called "the company"), executed a trust deed to secure a series of 1000 first mortgage debentures, each for 100*l*., and thereby granted, demised, and assigned certain freehold and leasehold properties and policies of assurance of or to which the company was then seised or entitled to the Law Guarantee and Trust Society, Limited (hereinafter called "the society"), and the company thereby also granted and assigned unto the society the undertaking of the company and all its property present and future, including its uncalled capital, except the property thereinbefore conveyed and the last days of any terms of years vested in the company.

Clause 6 provided that until the security thereby constituted became enforceable and the trustee (which term included the society or other the trustees or trustee for the time being of the trust deed) was in a position to enforce the same the trustee should "permit the company to hold and enjoy the mortgaged premises and to carry on therein and therewith the business or any of the businesses authorised by the memorandum of association of the company and as regards the mortgaged premises other than the mortgaged hereditaments" (i.e., the freehold and leasehold hereditaments and policies thereinbefore assured) "these presents shall operate as a floating security but so that the company shall not be at liberty to create any mortgage or charge on such premises ranking in priority to or pari passu with the security created in favour of the debentures."

The form of debenture was contained in the first schedule to the trust deed, and clause 2 of the debenture charged with payment of principal and interest the undertaking of the company and all its property present and future, including its uncalled capital for the time being; and by clause 3 it was declared "that this debenture is issued upon and subject to the conditions indorsed hereon which are to be deemed part of it."

Condition 3 was as follows: "The charge hereby created is

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subject and without prejudice to the security constituted by the said indenture "—i.e., the trust deed—"and such charge shall save as regards the freehold and leasehold hereditaments specifically conveyed and demised by the said indenture be a floating charge and accordingly the company shall be at liberty (save as aforesaid) in the course of its business and for the purpose of continuing and carrying on the same and the bona fide prosecution and conduct of its undertaking and business or any part thereof to use employ sell mortgage charge lease exchange or otherwise deal with or dispose of all or any part of the property for the time being which may require to be so used employed dealt with or disposed of but so that the company shall not have power to create any mortgage or charge ranking pari passu with or in priority to the said debentures Provided always that nothing herein contained shall prevent the company from charging by way of specific mortgage either pari passu with or in priority to the charge hereby created any freehold leasehold or copyhold properties which may be acquired by the company at any date subsequent to the 5th day of March, 1901."

The fifth schedule to the trust deed provided that a general meeting of the debenture-holders should have (inter alia) power by extraordinary resolution to sanction any modification or compromise of the rights of the debenture-holders against the company or against its property whether such rights should arise under the debentures or under those presents or otherwise, and to assent to any modification of the provisions contained in those presents which should be proposed by the company.

The common seal of the company was affixed to the trust deed in the presence of the plaintiff, who was at that time chairman of the board of directors of the company.

Particulars of the trust deed and debentures were duly registered pursuant to s. 14 of the Companies Act, 1900.

In June, 1904, the company agreed to purchase a certain brewery and various licensed premises from A. W. Kelland and the defendant Lucy Adams Kelland for 5350*l.*, and it was a term of the agreement that 3000*l.* should remain on mortgage of the property, which was all freehold. Conveyances of the various premises to the company were duly executed in September,

1904, and retained by the vendors' solicitor, and by an indenture dated January 27, 1905, the same premises were conveyed by the company to A. W. Kelland and the defendant L. A. Kelland in fee simple by way of mortgage to secure 3000*l.* and interest representing the balance of the purchase-money remaining unpaid and belonging to the mortgagees on a joint account. Neither the vendors nor their solicitor had any notice of the debentures, and no inquiry or search was made in respect of the company's title.

By an indenture of mortgage dated June 7, 1906, the company conveyed all the last-mentioned premises to the plaintiff in fee simple (subject to the mortgage of January 27, 1905) to secure payment of the sum of 3000*l.* advanced by him to the company.

On March 25, 1909, A. W. Kelland died.

On April 14, 1909, the plaintiff issued the writ in this action for redemption of the mortgage of January 27, 1905, and foreclosure against the defendant company and society.

On July 16, 1909, the defendant L. A. Kelland transferred to the plaintiff the mortgage of January 27, 1905, and she was subsequently dismissed from the action.

The plaintiff now claimed against the defendant company and society an account and foreclosure in respect of both mortgages, and delivery of possession.

Stewart-Smith, K.C., and *Frederic Thompson*, for the plaintiff. The mortgage of January 27, 1905, was a good mortgage. Having regard to the agreement that part of the purchase-money should remain on mortgage, the sale by, and mortgage to, the Kellands was all one transaction, and although the conveyances were executed some time before the mortgage, the deeds remained the whole time in the custody of the vendors' solicitor with the vendors' lien attaching to them.

The trustees under the trust deed are in no better position than the company and can only take what the company can give them, that is, an equity of redemption in the property.

The plaintiff has not lost priority: *English and Scottish Mercantile Investment Trust, Ld.* v. *Brunton* (1); *In re Castell*

(1) [1892] 2 Q. B. 1, 700.

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& Brown, Ld. (1); *In re Valletort Sanitary Steam Laundry Co.* (2) Moreover, the mortgage of January 27, 1905, is a legal mortgage.

The vendors on the sale to the company had no actual notice of any charge on the property. There was no need to investigate the title to the property, they assumed that the title to the property remained the same, and they were justified in the assumption. The mortgage and the sale constituted one transaction and they never parted with the title deeds. There was no necessity for them to search.

The registration of the particulars relating to these debentures pursuant to the Companies Act, 1900, s. 14, would not have affected them with constructive notice of such a restriction upon the operation of a floating charge as is contained in clause 6 of this trust deed.

With regard to the mortgage of June 7, 1906, we submit that it also is entitled to priority over the debentures. The debentures created a floating charge upon the future property of the company in favour of the debenture-holders and passed only an equitable interest. The trust deed is only collateral to the debenture, which is the primary document. Clause 6 of the trust deed corresponds closely with condition 3 of the debenture, but the latter contains in addition a proviso that nothing "herein" contained shall prevent the company from creating specific mortgages. The condition was indorsed on the form of debenture which was scheduled to the trust deed, and all the documents must be included in the word "herein," and the special proviso read as controlling the general provisions of the trust deed.

Jessel, K.C., and *Harman*, for the defendant society. The plaintiff is not entitled to priority in respect of either mortgage. He had actual notice of the trust deed and debentures when he took the second mortgage of June 7, 1906.

With regard to the mortgage of January 27, 1905, the vendors to the company abandoned their vendors' lien. They took a mortgage for the unpaid purchase-money, but they first of all let the legal estate get into the company, and the moment that

(1) [1898] 1 Ch. 315. (2) [1903] 2 Ch. 654.

happened the right of the debenture-holders attached and gave them priority over the vendors' security: *General Finance Mortgage and Discount Co.* v. *Liberator Permanent Benefit Building Society.* (1)

The company had no power independently of the debenture-holders to create a mortgage on the property in question having priority to the security created by the trust deed. The trust deed is the primary document and in case of ambiguity must be construed against the grantor. The charge created by the debenture is expressly "subject and without prejudice to the security constituted by the trust deed," and in the proviso to condition 3 the word "herein" must refer to the conditions indorsed on the debenture and cannot have the extended application contended for by the plaintiff. Further we submit that for a specific mortgage to rank pari passu with or in priority to the debentures the mortgage deed must contain an express statement to that effect, and the mortgage in question contains no such statement. There is nothing inconsistent in the trust deed conferring a better security than the debenture.

We submit that the vendors must be taken to have had constructive notice of the trust deed and debentures. Particulars were registered in compliance with the Companies Act, 1900, and that was enough to affect the vendors with notice: *Irvine* v. *Union Bank of Australia* (2); *In re London and New York Investment Corporation* (3); and if the vendors' solicitor had been prudent he would have found out enough to have made him satisfy himself that the debentures did not affect the after-acquired property of the company.

Registration under the early Yorkshire Registry Act was held not to be notice in *Wiseman* v. *Westland* (4), but in *Ex parte Kensington* (5) Lord Eldon seems to have thought that the decision ought to have been the other way.

In *English and Scottish Mercantile Investment Trust, Ld.* v. *Brunton* (6) there was a statement leading to the belief that there was no incumbrance having priority to the mortgage. *In re*

(1) (1878) 10 Ch. D. 15.
(2) (1877) 2 App. Cas. 366, 379.
(3) [1895] 2 Ch. 860, 871.
(4) (1826) 1 Y. & J. 117.
(5) (1813) 2 V. & B. 79.
(6) [1892] 2 Q. B. 1, 700.

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Castell & Brown, Ld. (1) and *In re Valletort Sanitary Steam Laundry Co.* (2) turned on the possession of the title deeds. All those were cases of debentures previous to the commencement of the Companies Act, 1900, and are distinguishable.

Stewart-Smith, K.C., in reply. There never was any abandonment of the vendors' lien. If a search had been made nothing more would have been discovered than that all the property of the company present and future was subject to a floating charge; and that would not necessarily have affected this particular property. The provision in the trust deed is in effect only a covenant to give a charge, and unless it can be brought home specifically there cannot be constructive notice of it. Fry J. in *Kettlewell* v. *Watson* (3) defines constructive notice as "that kind of notice which the Courts have inferred against a person from his wilfully abstaining from making inquiry or inspecting documents." We submit that no such notice ought to be inferred in this case.

At the close of the arguments, his Lordship ordered the hearing to be adjourned for a week, and notice of motion for judgment to be served on the company, but the company did not appear at the adjourned hearing, and his Lordship delivered the following written judgment:—

May 9. EVE J. As regards the mortgage of January 27, 1905, it is, in my opinion, immaterial whether the mortgagees had, or had not, notice of the deed of 1901 and the debentures thereby secured. Any equity which attached to the property contracted to be purchased in June and conveyed to the company in September, 1904, in favour of the debenture-holders, or their trustees, was, throughout, subject to the paramount equity of the unpaid vendors; and the legal mortgage which secures the unpaid purchase-moneys must, in my opinion, take priority over any charge to persons claiming through the purchaser.

I hold, therefore, that the plaintiff is entitled to priority over the defendant society in respect of the mortgage of 1905.

(1) [1898] 1 Ch. 315. (2) [1903] 2 Ch. 654.
(3 (1882) 21 Ch. D. 685, 704.

The evidence proves that the vendor-mortgagees had no actual notice of the debentures and the trust deed, but had I come to the conclusion that the priority of their mortgage depended upon the question whether or not they had any notice, I should have been prepared to hold that the particulars registered in this case pursuant to s. 14 of the Companies Act, 1900, amounted to constructive notice of a charge affecting the property but not of any special provisions contained in that charge restricting the company from dealing with their property in the usual manner when the subsisting charge is a floating security. I think this view is in accordance with the judgment of Kekewich J. in *In re Standard Rotary Machine Co.* (1)

The real difficulty in the case arises in respect of the mortgage of June 7, 1906. Was it competent for the company at that date to give the plaintiff a security ranking in priority to the security of the debenture-holders? The answer depends on the true construction of the debentures and the trust deed securing them, and on this the difficulty of reconciling the provisions of clause 6 of the deed with the third condition indorsed on the debenture raises a serious question. If it were permissible to conjecture how the inconsistency between the clause and the condition arose, it would not be difficult to attribute it to an omission on the part of the draftsman to add at the end of clause 6 of the deed the proviso which would seem to have been added to the third condition as originally framed. But the duty of the Court in this action is to construe, not to reform, the contract, and, in so doing, to give effect, if possible, to all its terms. To effectuate this I think I am bound to hold that in the proviso with which condition 3 concludes the words "herein" and "hereby" must be read as equivalent to "in this debenture" and "by this debenture," and that the proviso cannot be treated as controlling, or qualifying, the security created by the trust deed. The debenture-holder has the cumulative benefit of the security created by his debenture and by the trust deed; the former is not to operate so as to prevent the company charging subsequently acquired property in priority to or pari passu with it; the latter is so to operate unless and

(1) (1906) 95 L. T. 829, 834.

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until modified by the debenture-holders under the provisions contained in the fifth schedule to the deed. No such modification having been made, I come to the conclusion that the company could not in June, 1906, create a security in favour of the plaintiff ranking in priority to the trust deed, and accordingly I hold that in respect of this mortgage the plaintiff is not entitled to any order for foreclosure against the society.

In respect of the mortgage of January 27, 1905, there will be the usual foreclosure order against the company and the society and an order for delivery of possession to the plaintiff of the mortgaged premises.

Solicitors: *Coleman, Betts & Howard, for Edgcombe Stevens, Plymouth; Gribble, Oddie, Sinclair, Rowlatt & Johnson.*

R. M.

EVE J. 1910 *May* 27.

In re MAYOR AND CORPORATION OF LONDON.

MAYOR AND CORPORATION OF LONDON *v.* GREAT WESTERN AND METROPOLITAN RAILWAYS.

[1909 L. 2536.]

Landlord and Tenant—Lease—Substructure and Supports of Market—Covenant to well and sufficiently maintain and keep in repair—Construction—Iron Girders—Deterioration—Measure of Liability—Standard of Strength.

A lease by the Mayor and Corporation of London to a railway company of portions of the substructure and supports of Smithfield Meat Market for the purposes of a station for a term of 100 years from August 1, 1878, perpetually renewable, contained a covenant that the lessees would, during the term, "well and sufficiently maintain, uphold, support, and keep in good, substantial, and tenantable repair" all the demised premises, including the walls, piers, pillars, supports, and roof forming part of the same. The substructure had been excavated and the supports for the roof constructed upon a standard of efficiency to the satisfaction of referees appointed on behalf of the lessors and lessees, in pursuance of an agreement of 1862. There was evidence that some of the iron girders supporting the roof and superstructure had become corroded and weakened, and in 1907 notice to repair according to the covenant was given to the lessees:—

Held that, upon the true construction of the lease, the lessors were entitled to require the lessees to maintain the demised premises at a

standard of strength and stability corresponding with that originally fixed, and not merely in such a condition as would secure the absolute safety of the superstructure.

ADJOURNED SUMMONS.

By the Metropolitan Meat and Poultry Market Act, 1860 (23 & 24 Vict. c. cxciii.), s. 10, the plaintiffs were empowered to appropriate the whole or any part of the underground surface beneath the then intended meat and poultry market at Smithfield for the purpose of a railway station, and to enter into any contract or agreement with any railway company for the excavation and erection of such railway station.

By an agreement, dated July 22, 1862, made between the plaintiffs and the defendant companies, and providing for the excavation of the basement of the lands therein mentioned, and for the erection of a station, it was, inter alia, provided that the station walls and the roof, and the columns, girders, and brick arches which, with the station walls, would form the supports of the market house, and the floor thereof, should be designed and constructed under the direction and to the satisfaction of referees to be appointed as therein mentioned; and the roof over the basement, and the arches and other supports of the roof, and the works connected therewith, were to be proper and sufficient for supporting the market place and roadways to be made by the Corporation. And the agreement further provided for the granting of a lease or leases of the basement, within six months after the completion of the several works to the reasonable satisfaction of the City architect, who was one of the referees thereby appointed.

The companies completed the underground station and roof, under the direction and to the satisfaction of the referees, between 1862 and 1868. The market was opened on December 2, 1868. By a lease dated August 1, 1878, made in pursuance of the agreement of 1862, the plaintiffs demised to the Great Western Railway Company certain portions of the substructure or basement storey of the Metropolitan Meat and Poultry Market, Smithfield, and also all the vaults and arches shewn upon a plan, for a term of 100 years at a rent of 1000*l.* a year; and in addition to the usual covenants for payment of rent, &c., the

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lessees covenanted, inter alia, that they would, during the continuance of the term thereby granted, "well and sufficiently maintain, uphold, support, and keep in good, substantial, and tenantable repair, order, and condition, all and singular the premises hereby demised, including the retaining and other walls, piers, pillars, supports, and roof forming a part of the same, ... and at the end, or sooner determination of the said term hereby demised, peaceably surrender up to the Corporation and their assigns, the said demised premises in good and substantial repair and condition."

Another lease of the same date of other portions of the substructure was granted by the plaintiffs to the Metropolitan Railway Company for a similar term and with similar covenants. Both leases contained a covenant by the plaintiffs for the perpetual renewal of the term of 100 years.

In 1906 Mr. Walmisley, the plaintiffs' engineer, made a report to the effect that some of the supporting girders of the market floor had become greatly weakened by corrosion, due to the moisture of the atmosphere and the emission of sulphur fumes, but that, as originally constructed, they were strong enough to carry weights in excess of any that had been imposed.

On July 25, 1907, the plaintiffs gave notices to the two defendant companies, requiring them to well and sufficiently maintain, uphold, support, and keep in good, substantial, and tenantable repair, order, and condition the demised premises. It was agreed that the exact work to be done was to be left to referees, after the question of principle had been decided, as to the measure of the obligation of the two companies.

On December 2, 1909, an originating summons was taken out by the lessors to determine whether, on the true construction of the lease of August 1, 1878, the covenant of the lessees as to maintenance compelled or involved the maintenance of the substructure thereby demised, at a standard of strength and stability corresponding with that originally fixed, and not merely at such a lower standard as might be actually sufficient from time to time to carry and support the weights and stresses imposed, or about to be imposed, on the said substructure.

There was evidence by an affidavit of Mr. Grierson, the engineer

of the Great Western Railway, made in January, 1910, in which, after admitting that deterioration had taken place since the date of the lease, he was nevertheless satisfied that the floor under consideration was still of amply sufficient strength for any present or prospective weights that might be brought upon it; and that to restore the substructure to its estimated original strength would be simply wasteful.

P. O. Lawrence, K.C., and *Sargant*, for the plaintiffs. The summons is issued to determine the principle of liability. It is admitted that there has been deterioration in the girders, and under the covenant they ought to be kept in substantially the same condition as they were in when they were new, the measure of stability having been settled by the referees at the time when the works were executed. If this is not so, it would impose an almost intolerable burden upon the lessors. The cases upon the construction of covenants to repair mainly relate to houses: *Gutteridge* v. *Munyard* (1); *Payne* v. *Haine* (2); *Proudfoot* v. *Hart*. (3) They are instructive as to the meaning of "good and tenantable repair." The purpose for which the premises are to be used is not a question to be considered in the construction of a covenant to maintain. Our submission is that, having regard to the nature of the property demised and to the length of the lease, there is an obligation upon the defendants to keep the works, which were new at the date of the commencement of the tenancy, in substantially the same condition as that originally settled between the engineers of the respective parties as requisite and necessary for the purpose.

Howard Wright, for the defendant companies. The companies have never disputed their liability to keep up the substructure to a standard of strength amply sufficient to bear all the weights and stresses which are now, or are likely in the immediate future to be, cast upon it. They are willing to refer it to any engineer or arbitrator to say what shall be necessary for that purpose. The cases which have been decided on repairs of houses throw very little light upon this case. The covenant here requires that the

(1) (1834) 1 Moo. & R. 334. (2) (1847) 16 M. & W. 541.
(3) (1890) 25 Q. B. D. 42.

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supports shall be "sufficiently" maintained. That is a relative word—sufficient for something. In the case of the demise of a prop, the test of sufficiency is adequacy to support the burden imposed. It is well settled under the authorities that a lessee cannot be required to make a new thing. When new construction is required here, it will fall on the lessors. I submit that a covenant in these terms obliges a lessee to put and keep the demised premises in substantially good repair, having regard to the character of the premises, when demised, and the purposes for which they are to be used. That proposition is warranted by all the authorities, such as *Payne* v. *Haine* (1), *Belcher* v. *M'Intosh* (2), *Gutteridge* v. *Munyard* (3), and *Torrens* v. *Walker*. (4) It is a mere question of the construction of the covenant in the deed of 1878, and one which is qualified in form and in substance. The agreement of July 22, 1862, must be altogether excluded from consideration. A literal compliance with the covenant is not required, only a substantial compliance: *Lister* v. *Lane*. (5)

P. O. Lawrence, K.C., in reply on the word "sufficiently." "Sufficiently" means "properly." The covenant is to "well and sufficiently maintain" these particular supports which were then erected and were demised to the lessees. It cannot be held to be a contract to sufficiently support the superstructure; there is not a word of that in the lease. The lessees must maintain the supports substantially of their original strength. The lessees are not the judges of what the purpose is.

EVE J. The terse and cogent argument, if he will allow me to say so, which Mr. Howard Wright addressed to me in this case, I frankly confess, introduced into my mind an element of doubt which I did not feel before I heard him; but having now heard Mr. Lawrence in reply, and having returned, if I ever departed from it, to the conclusion at which I had arrived upon reading the documents in the first instance, I do not know that any advantage would be derived from further considering the matter, and I propose, therefore, to give judgment now.

(1) 16 M. & W. 541.
(2) (1839) 8 C. & P. 720.
(3) 1 Moo. & R. 334.
(4) [1906] 2 Ch. 166.
(5) [1893] 2 Q. B. 212.

The question arises upon the construction of certain leases granted by the Corporation of London to the Great Western and Metropolitan Railways. On the present occasion it will be sufficient if I examine and construe one of those leases, as, for all practical purposes, it is identical in terms with the other. It is a lease of August 1, 1878, whereby there were demised to the Great Western Railway for a term of 100 years, with a proviso making the term perpetually renewable, certain premises which included the space under the Metropolitan Meat Market, some vaults, and the pillars supporting the girders upon which rested the roof of the railway station underneath the meat market. On the roof was superimposed the meat market itself. In the lease are contained covenants by the railway company to pay the rent reserved, to pay rates, taxes, and other outgoings, and a covenant to maintain and repair in these terms: "The company and their assigns shall and will, during the continuance of the term hereby granted, well and sufficiently maintain, uphold, support, and keep in good, substantial, and tenantable repair, order, and condition, all and singular the premises hereby demised, including the retaining and other walls, piers, pillars, supports, and roof, forming a part of the same."

The question I have to decide is, whether the obligation of the company under that covenant, in respect more particularly of the retaining and other walls, piers, pillars, supports, and roof, is to be measured by the condition of those parts of the premises at the date when the demise took effect, or whether the obligation is to be measured by the burden and purposes which those portions of the demised premises are intended to sustain and serve. On behalf of the company, their liability to do everything that is necessary for the purpose of supporting the superstructure erected on the roof of the station is admitted, and it is contended that so long as this state of things is maintained they discharge all the obligations which lie upon them under this covenant. On behalf of the Corporation, it is urged that this is not the true measure of the liability imposed upon the company; that when this property was demised to the company it was demised to them in a certain condition with certain provisions

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made for the support of the superstructure, and that the Corporation, in their discretion, imposed upon the company the clear obligation to maintain that subsisting state of things, and not an indefinite obligation to maintain a state of things sufficient for the time being to support the superstructure.

A condition of affairs has now arisen when it may be necessary to consider two questions, the one whether the walls, pillars, and girders, as now subsisting, are sufficient to support the superstructure, and the other, whether the condition of the walls, pillars, and girders is substantially in accordance with their condition at the commencement of the demise. With regard to the second question, it seems to be more or less common ground that some deterioration, the extent of which is not yet ascertained, must necessarily have taken place in the period which has elapsed since the pillars and girders were first erected. Mr. Howard Wright contends that if the pillars and girders in their present condition are sufficient to sustain the burden, and to perform the purposes for which they were originally put there, the company cannot be called upon to do anything more; and he suggested that the forthcoming inquiry, which is to be made by a more competent tribunal than this, ought to proceed on the footing that the obligation of the company is limited to the maintenance of the walls, girders, and pillars in such a condition as will secure the absolute safety of the superstructure. On the other hand, the Corporation say that this is not the principle upon which the referees ought to proceed, but that what they ought to do is first to ascertain what the condition of things was when the tenancy commenced, and then see whether the present condition of these parts of the demised premises substantially corresponds with the condition in which they were at the commencement of the demise; and that if it should turn out that the present condition of things falls substantially short of the condition when the tenancy commenced, then the Corporation are entitled to insist upon the company making good and restoring the demised premises to the condition in which they were at the date last mentioned.

In my opinion, the contention of the Corporation is right. I

think that in the face of this covenant, plain and explicit in terms, it is not open to the company successfully to contend that the measure of their obligation is the safety and the absolute safety of the superstructure, but that the true measure of their obligation has to be ascertained with reference to that which constituted this part of the demised premises at the time when the tenancy commenced. For reasons which no doubt seemed good and sufficient the parties to the lease agreed upon a certain standard of efficiency, and I do not think it is open to either of them to depart from that standard; the liability of the lessees to support the superstructure is to be ascertained, and at the same time limited by the condition of affairs subsisting at the date of the demise.

Accordingly, I must answer the question which is propounded by the summons by saying that, on the true construction of the lease, the Corporation are entitled to require the company to maintain the premises thereby demised at a standard of strength and stability corresponding with that originally fixed; and, if no arrangement as to costs has been made, I must direct that they be paid by the respondent companies.

Solicitors: *Sir Homewood Crawford; L. B. Page.*

G. M.

PARKER J.
1910
May 11, 12,

In re PARK.
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[1909 P. 1468.]

Will—Condition as to Consent to Marriage—Marriage with Consent in Testator's Lifetime—Codicil confirming Will after the Marriage.

A testator by his will gave real and personal property in trust for his son for life, and on his death, in case he should marry "with the consent in writing of my said wife and my said trustees," in trust for the son's children in equal shares; but if he should marry without such consent, or if he should marry with such consent and should have no child who should live to attain twenty-one years of age, on trust as to the realty for the person or persons who at the time of the son's death would be entitled thereto as the testator's heir or co-heirs at law if he had then died seised thereof intestate, and as to the personalty for the testator's wife.

The son married in the testator's lifetime with his consent and approbation, and after the marriage the testator made a codicil altering his will, but not the gift above stated, and in all other respects confirming the will. The son's wife died in the testator's lifetime, and the son survived him and died without having married again or had any issue:—

Held, (1.) that the son's marriage fulfilled the condition of the will; (2.) that the codicil had not the effect of requiring the marriage to take place after the testator's death; and (3.) that the gift over in case of marriage with consent but death without children took effect.

Presumption as to testators' intention in cases of conditions involving consents to marriages of their sons or daughters.

John Cornelius Park by his will, dated April 9, 1863, after giving legacies and annuities to his wife and other persons and making a specific devise, gave, devised, and bequeathed all his residuary real and personal estate to trustees upon trust to convert the same and to pay the rents of the realty and the income of the personalty to his only son, Cornelius John Park, during his life or until he should sell, charge, or alienate the same, or attempt so to do, and on his death or the determination of his interest to hold the realty and personalty and investments on trust "in case my son shall marry with the consent in writing of my said wife and my said trustees" for all and every the children and child of C. J. Park, the son, who should live to attain the age of twenty-one years in equal shares, or if there should be but one such child, for that child; and "if my said son shall marry without such consent as aforesaid, or if he shall

marry with such consent and shall have no child who shall live to attain the age of twenty-one years," on trust as to the realty for the person or persons who at the time of the son's death would be entitled thereto as heir or co-heirs at law if he had then died seised thereof intestate, and as to the personalty for the wife of the testator.

C. J. Park, the son, married in the testator's lifetime, on September 2, 1875, with his consent and approbation.

On February 21, 1876, the testator made a codicil making certain alterations in his will, but which did not affect the gift of residue, and in all other respects he thereby confirmed his will.

The son's wife died in 1878, the testator in 1887, and the testator's wife in 1892.

The son died in 1909 without having married again and without having had any issue.

An originating summons was taken out by the trustees of the will for the determination of the question whether on the true construction of the will and codicil and in the events which had happened the residuary realty and personalty were undisposed of as from the date of the son's death.

Sheldon, for the plaintiffs.

Buckmaster, *K.C.*, *Sargant*, and *Marten*, for persons entitled to interests of the co-heirs of the testator at the date of his son's death. The condition as to marriage is fulfilled by the marriage with the consent of the testator in his lifetime: *Clarke* v. *Berkeley* (1); *Parnell* v. *Lyon* (2); *Wheeler* v. *Warner*. (3) If this were not so, and the son had left children, but had been a widower at his father's death, he would have had to marry again in order that the children of his first marriage might take.

There is this difference in the present case, that the will was confirmed by a codicil after the marriage had taken place. But a codicil which confirms a will is not a republication of it for all purposes so as to make it speak as from the date of the codicil: *Stilwell* v. *Mellersh* (4); *Hopwood* v. *Hopwood*. (5)

(1) (1716) 2 Vern. 720.
(2) (1813) 1 V. & B. 479.
(3) (1823) 1 S. & S. 304.
(4) (1851) 20 L. J. (Ch.) 356.
(5) (1859) 7 H. L. C. 728.

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If the son did marry without consent, the gift over nevertheless takes effect.

A. Grant, K.C., and *Draper*, for another party in the same interest.

Martelli, K.C., and *J. S. Green*, for the legal personal representatives of the widow of the testator, adopted the same arguments.

Romer, K.C., and *R. R. Reeve*, for the legal personal representatives of the testator's son. As the condition was not satisfied, there was an intestacy, and the son took the realty. He was also one of the next of kin.

However the will is construed the result must be capricious, for if the son married with the consent required, the property on his death would go to all his children, and if he married without consent, the son's eldest son as heir of the testator would take the realty. The decisions referred to seem to be based on the fact that the testator intended to protect the donees from imprudent marriages, but there is no indication of such an intention in the present case. The plain meaning of the will is that a marriage after the testator's death is what he referred to, for he had no trustees until his will came into operation by his death.

Moreover, the confirmation of the will by the codicil emphasizes the argument that a marriage after the testator's death was referred to. Lord Cranworth's decision in *Stilwell* v. *Mellersh* (1) is inconsistent with many cases which make it clear that where a codicil confirms a will the latter is republished as from the date of the former and speaks as from that date: *In re Champion* (2); *In re Rayer* (3); *In re Fraser*. (4)

Buckmaster, K.C., in reply, referred to *Violett* v. *Brookman*. (5)

PARKER J. This case raises a somewhat curious point. It appears that at the time the testator made his will the son, Cornelius John Park, was the testator's only son, and that in 1875, during the testator's lifetime, he married with the testator's

(1) 20 L. J. (Ch.) 356.
(2) [1893] 1 Ch. 101.
(3) [1903] 1 Ch. 685.
(4) [1904] 1 Ch. 726.
(5) (1857) 5 W. R. 342.

consent and approbation. Subsequently to that marriage and while the testator's wife was still living, the testator made a codicil, in which, after certain alterations in his will, which are unimportant for the purposes of this case, he confirmed his will except as altered. The testator died in 1887, and the son died in 1909 without having had issue by the marriage which I have mentioned, and without having married again. The question is whether, in the events that have happened, the gift over contained in the will in the alternative event of the son marrying without the consent in the will specified, or marrying with such consent and not having a child who attained the age of twenty-one years, has taken effect, or whether there is in effect an intestacy as to the real and personal estate. If there is an intestacy the son himself takes the real estate and a portion of the personal estate, inasmuch as he was the sole heir-at-law and one of the next of kin of the testator. On the other hand, if the gift over takes effect, the son is excluded from the artificial class to whom the property is left by the terms of the will, inasmuch as that class is not to be ascertained until the son's death.

In all cases of conditions involving consents to marriage, where the testator is providing for his son or daughter, I think the presumption is that the testator intends—he may not be altogether successful, but he intends—to introduce provisions which he hopes will ensure that the son or daughter shall not make an improvident marriage, but one of which he himself would approve if he were living at the time when it took place. Proceeding on that footing, I think the Courts have come to the decisions which have been quoted to me in the course of the argument in this case. It appears to be well settled law that where there is such a condition, and the marriage takes place in the lifetime of the testator, with his consent, it is for all the purposes of the will a fulfilment of the condition. That appears, I think, in *Parnell* v. *Lyon* (1), where Sir William Grant M.R. says: "Supposing, for the sake of the argument, that Mrs. Parnell married with consent of her father, it is difficult to conceive, however the will may be expressed, that he could mean a less beneficial provision for her, than if she had married after his death with consent of

(1) 1 V. & B. 479, 483.

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his executors"; the condition there being that the executors had to consent to her marriage. I think that is also the principle acted upon in *Wheeler* v. *Warner*. (1) That case is remarkable in this respect—that there was not, as in the present case, a general condition, but one imposed in these words, "that in case his daughter Sophia should at any time after his decease . . . . intermarry"; and notwithstanding that the condition referred, and expressly referred, to a period after the decease of the testator, yet it was held that a marriage in the lifetime of the testator, with his consent, was a practical fulfilment of the condition for the purpose of giving effect to the terms of the will. That also, I think, is really the ratio decidendi of the earlier case of *Clarke* v. *Berkeley* (2); for in that case the Lord Chancellor said that as to the condition in the will, of the lady having the consent of the trustees and of her mother, that was dispensed with by having the testator's own consent, which was more to be regarded than any consent of trustees, to whom he had delegated a power to consent in case of a marriage after his decease. If, then, that is the principle, and considering the matter quite apart from the codicil, any children of the son born during the testator's lifetime of the marriage of which the testator had approved in his lifetime would, I think, clearly have been entitled to the provision made for them by the will in the event of their attaining twenty-one years of age; subject, of course, to the interest which had previously been given to the son. In other words, the condition imposed, which, of course, is prima facie a condition applying only to marriage after the testator's death, would, for the purpose of seeing who is to be beneficially interested under the will, have been taken to have been fulfilled, and the children would come in. But there having been no children, the question arises whether the condition is also to be taken to have been fulfilled for the purposes of the gift over, the gift over being alternatively in the event of the son marrying without such consent, or in the event of his marrying with such consent and having no child who should attain twenty-one. In my opinion the condition must also be taken to have been fulfilled for the purposes of the gift over. I

(1) 1 S. & S. 304. (2) 2 Vern. 720.

think there are some remarks in some of the cases quoted which suggest that the true principle is not that of considering that the condition has been fulfilled, but that the child, or other persons entitled under the will in the event of the child marrying, with or without consent, are exempt from the condition altogether, so that the will must be read as if there were no condition. But, however you put it, it appears to me that in the present case, the condition having been in effect fulfilled, or having been in effect struck out by reason of the marriage in the lifetime of the testator, both the children of the son as to whose marriage the condition applied and the persons entitled in default of children must come in under the terms of the will on the principle of the cases to which I have referred. There is another and a shorter way of putting it, and I am not sure that that alone would not be sufficient for the case. It is clear on the cases that the marriage in the lifetime of the testator may be a marriage to which the condition refers; and, at any rate in the present case, it appears that the son did marry, and that he had no children. Either he married with, or without, the consent; and in the events that happened it makes no difference one way or the other—the property goes over. That is a shorter way of putting it, but I do not think it is such a logical way, having regard to the cases which have been decided.

Hitherto I have dealt with the matter quite apart from the codicil; but the suggestion is that, the codicil having been made after the marriage, and confirming the will, I must treat the will as having for all purposes been made at the date of the codicil, and that therefore the condition can only refer, not to the first marriage, but to a subsequent marriage; and that, inasmuch as the son never did marry again after the death of the first wife, to whose marriage the father had consented, there is an intestacy, since there has been no such marriage as is contemplated by the will so read. It is perfectly clear, on the cases quoted by counsel for the parties entitled on an intestacy, that for many purposes the republication of a will may affect the property to which a devise or bequest in the will applies; but I do not think any of the authorities quoted go to this length, that for all purposes in construing it I must treat the will as

PARKER J. 1910 PARK, *In re.* BOTT *v.* CHESTER.

having been made at the date of the codicil. A doctrine of that sort would lead to extraordinary results. For example, taking the instance put in *Stilwell* v. *Mellersh* (1), there might be a legacy to the person who now holds the position of treasurer of Lincoln's Inn. If you read the will at a subsequent date, the legatee might have been entirely altered. I do not think the doctrine of republication has ever been carried to that extent. As a matter of fact, in the present case, if you consider the doctrine of republication as affecting the beneficial interests at all, the result seems to be that it might have cut out a class of children of the son who are provided for under the will, and who were intended to benefit; and that, instead of actually confirming the will by a codicil which is expressed to confirm it, the testator would in effect, if that doctrine be applied, be revoking the bequest which had been made in the will to persons who were intended to benefit by it. So far from confirming his will, he would be revoking it. In my opinion it is impossible to carry the doctrine of the cases quoted as to the effect of republication to that extent. It appears to me that if I conclude, as I do conclude, that had there been children of the son's marriage they would have been entitled by virtue of the will to the provision therein made for them, notwithstanding the fact that the son had married in the lifetime of his father, because the father had consented to the marriage, I ought not, because of the codicil, to cut out those children; and similarly I ought not to cut out from the benefit of the will the persons entitled if there were no such children, merely because of the republication.

In these circumstances I hold that the real estate goes to the artificial class mentioned in the will, and that the personal estate goes to the legal personal representative of the widow; and that the son, as heir-at-law, and the next of kin of the father, have no interest in the question, except in so far as they may come into that artificial class.

Solicitors: *E. G. & J. W. Chester; Sherrard & Sons; Woodroffes & Ashby; Travers-Smith, Braithwaite & Co.; W. P. Davies.*

(1) 20 L.J. (Ch.) 356.

F. E.

JOYCE J.
1910
June 21, 28.

In re BASKERVILLE. BASKERVILLE *v.* BASKERVILLE.

[1910 B. 774.]

Trustee—Power to grant Mining Leases—Unopened Mines.

A testatrix by her will devised to her trustees her undivided share in certain lands upon trust for sale, conversion, and investment and gave them power to postpone such sale and conversion, and declared that whilst any part thereof should remain unsold it should be lawful for her trustees to let and manage and to join with any other person or persons in letting and managing all such part thereof as for the time being should remain unsold, and also gave them power to grant any building or other leases for such term at such rents and upon such conditions as they might think fit. There were mines of coal and other minerals existing under the lands, some of the mines being open and others unopened:—

Held, that the trustees had power to join with the persons entitled to the other undivided shares in the lands in granting mining leases, but that the power did not extend to unopened mines.

Opinion of Kindersley V.-C. in *Clegg* v. *Rowland*, (1866) L. R. 2 Eq. 160, 165, followed.

The testatrix Clara Anne Maria Baskerville by her will, dated in 1900, devised and bequeathed to her trustees all her one undivided ninth share in certain lands and hereditaments in the county of Monmouth and also her one undivided moiety of certain other lands and hereditaments and all other her real and personal estate upon trust for sale and conversion as therein mentioned, and for investment of the moneys to arise thereby as therein mentioned, and for payment of the income of such part of such investments as should represent the moneys arising from the sale of the said Monmouthshire hereditaments to the plaintiff H. W. M. Baskerville, the plaintiff E. R. M. Baskerville, and the defendant Edith Baskerville and the survivors and survivor of them in equal shares for life, and for payment of the income of the remaining part of such investments and of such part of the residue of her said trust estate except the Monmouthshire hereditaments as should for the time being remain unsold and unconverted to the defendant Edith Baskerville for life, and after her death unto the said H. W. M. Baskerville and E. R. M. Baskerville and the survivor for life, and after the death of those

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three beneficiaries to stand possessed of the whole trust estate for the defendant R. H. Baskerville. The testatrix gave her trustees power to postpone the sale and conversion of her real estate and declared that while any part thereof should remain unsold it should be lawful for her trustees to let and manage and to join with any other person or persons in letting and managing all such part or parts thereof as for the time being should remain unsold. The testatrix also gave the trustees power to grant any building or other leases thereof or of any part thereof for such term at such rents and upon such conditions as they might think fit. The testatrix further declared that the rents and income arising from her estate until conversion should be paid and applied as if it were the income of authorized investments.

The testatrix died on March 4, 1901.

The Monmouthshire lands, one undivided ninth share in which formed part of her estate, constituted a mining property consisting partly of open and partly of unopened mines. The nine co-owners thereof held their shares absolutely as tenants in common, no partition having been made between them.

From time to time the trustees had joined with their eight co-owners of the Monmouthshire property in granting leases other than mining leases. It was now proposed to grant several leases of mines and minerals lying under the Monmouthshire property, and the question arose (inter alia) whether, if the trustees had power to join with the other persons entitled to shares in the property in granting mining leases, that power extended to the granting of leases of unopened as well as of open mines.

This was an originating summons taken out by the trustees, H. W. M. Baskerville and E. R. M. Baskerville, for the determination of that question amongst others. The defendant Edith Baskerville was a person of unsound mind not so found, the Official Solicitor appearing as her guardian ad litem. The other defendant R. H. Baskerville was the remainderman under the will.

C. E. Shebbeare, for the trustees.

T. T. Method, for the defendant Edith Baskerville. There

is no doubt that the trustees have power to join with other persons in granting mining leases, and it is submitted that the power extends to granting leases of unopened mines: *Daly* v. *Beckett* (1); *In re Barker* (2), where Kekewich J. held that a general power to grant leases extended to granting leases of unopened mines. The only difficulty appears to be created by a statement in Co. Litt. 54 b, from which it appears that if the owner of land upon which there are open and unopened mines grants a lease of that land, whether the mines be expressly included in the lease or not, the lessee may work the opened mines, but is not justified in opening mines which are unopened. That principle was adopted by Kindersley V.-C. in *Clegg* v. *Rowland* (3), where he said: "If it be a sound doctrine that a lease by an owner in fee of the land and the mines, there being an open and an unopened mine, does not justify the lessee in opening the unopened mine, then it appears to me that a power to make a lease of the land and mines (even mentioning mines) ought to be construed only to authorize the granting of a lease, so as to entitle the lessee to work the open mines, and not to entitle him to work the unopened mines." But that view proceeded, as the Vice-Chancellor pointed out, on the supposition that mines were specifically mentioned in the power, whereas in that case the power did not specifically mention mines at all. That is therefore only a dictum. In the present case we have to deal with a power to let and manage a mining estate, and it extends to all mines whether open or unopened.

Francis Buckley (*Austen-Cartmell* with him), for the remaindermen. This case is covered by what was said by Kindersley V.-C. in *Clegg* v. *Rowland*. (3) The trustees have no power to join in granting a lease of unopened mines.

June 28. JOYCE J. The question in this case arises upon the will of the testatrix, who was the owner or part owner—I think only part owner—of mines of coal, some of which it is said were opened and others unopened mines; and the question is whether

(1) (1857) 24 Beav. 114. (2) (1903) 88 L. T. 685.
(3) L. R. 2 Eq. 160, 165.

JOYCE J. 1910 BASKERVILLE, *In re.* BASKERVILLE *v.* BASKERVILLE.

under certain clauses in the will the trustees may join with the persons entitled to other shares in the property in granting mining leases, and whether, if they have that power, the power extends to granting leases of unopened mines as well as of open mines. As I understand, there is no express reference to mines in this will at all, but there is a clause which provides that "Whilst any real or leasehold estate or any part or parts thereof shall remain unsold it shall be lawful for the trustees to let and manage and to join with any other person or persons in letting and managing all such part or parts thereof as for the time being shall remain unsold"; and the testatrix also gave the trustees power "to grant any building and other leases thereof, or of any part thereof for such term at such rents and upon such conditions as they he or she may think fit."

Now on the construction of this clause, whatever power of letting the trustees may have, I think they have power to join with the other parties entitled in granting mining leases, and on the authorities I have no doubt as to their power to grant leases of mines that are opened. The real question is as to their power to grant leases of mines that are unopened. Now I have considered this case a good deal, and, notwithstanding the case of *Daly* v. *Beckett* (1), it appears to me that if I held that this power extended to granting leases of mines that are unopened I should be deciding contrary to what I believe to be the received opinion among conveyancers and text-writers, and I could not do it without running contrary to the dictum—it is only a dictum, but it expresses the deliberate opinion—of Kindersley V.-C. in *Clegg* v. *Rowland*. (2) In the circumstances I do not see my way to do this. It is a serious thing to affect the settled law on a point like this, and if the trustees in such a case as this are to be empowered to grant leases of unopened mines, that must be held and decided by the Court of Appeal and not by me.

Solicitors: *Francis & Calder; Behrend & Rodger, for Cheese & Armstrong, Hay; The Official Solicitor.*

(1) 24 Beav. 114.

(2) L. R. 2 Eq. 160, 165.

G. A. S.

In re HOYLES.
ROW *v.* JAGG.

[1907 H. 1645.]

SWINFEN EADY J.

1910

April 20, 21; *June* 4.

Conflict of Laws—Mortmain—Testator domiciled in England—Residuary Bequest to Charity—Colonial Mortgages—Applicability of Colonial Mortmain Law—Movables or Immovables—English Law, including Mortmain Act, 1736 (9 *Geo.* 2, *c.* 36), *adopted in Colony.*

English law would treat English land mortgages as immovables, so that a bequest of English mortgages to charity would be governed by the local mortmain law of England, whatever be the domicil of the testator.

The general English law, including the Mortmain Act, 1736, and the decisions thereon as to the invalidity of local bequests of local mortgages or other impure personalty to charity having been adopted locally in Ontario :—

Held, that a bequest of freehold mortgages in Ontario to charity by a testator domiciled in England and dying on February 22, 1888, when the adopted Mortmain Act, 1736, was locally in force in Ontario, being a bequest of an interest in land forbidden by the local law, was invalid.

Freke v. *Lord Carbery*, (1873) L. R. 16 Eq. 461, and *Duncan* v. *Lawson*, (1889) 41 Ch. D. 394, 396, extended.

Canterbury Corporation v. *Wyburn*, [1895] A. C. 89, 96, applied.

Summons to vary Master's certificate.

By his will, dated June 25, 1878, a testator gave his personal and real property to his wife for life, and on her death he gave one third of it in charity.

The testator died on February 22, 1888, domiciled in England.

The wife died on December 4, 1906.

On May 29, 1907, a summons was issued to determine (inter alia) whether the gift was a good charitable gift, and, if so, whether it was void to any and what extent under the Mortmain Act, 1736 (9 Geo. 2, c. 36), which was in force at the testator's death. (1)

(1) The statutory short title of the 9 Geo. 2, c. 36, is "The Charitable Uses Act, 1735." Vide Short Titles Act, 1896 (59 & 60 Vict. c. 14). But as it only received the Royal assent on May 20, 1736 (House of Lords Journals, vol. 24, p. 681b), and came into operation on June 24, 1736, the popular title seems more accurate.

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By an order of June 3, 1908, it was determined that the bequest of the one third share created a valid charitable trust so far as regarded such portion of that share as consisted of pure personalty, and an inquiry was directed as to what part of that share was at the testator's death attributable to pure personalty and what to impure personalty.

By his certificate, dated March 23, 1910, the Master certified (inter alia) that $16,340 invested on five legal mortgages of freehold land in the city of Toronto, in the Province of Ontario, Canada, and worth 3348*l.* at the testator's death, was attributable to impure personalty.

On March 30, 1910, the Attorney-General issued a summons to vary this finding, and to have it determined that the mortgage moneys were pure personalty within the English Mortmain Act, 1736.

It was established by the evidence of Canadian counsel that the laws of England, including the Mortmain Act, 1736, and the decisions thereon were introduced into Upper Canada in 1792 by the 32 Geo. 3, c. 1, which provided that "in all matters of controversy relative to property and civil rights resort should be had to the laws of England as the rule for the decision of the same," so that in matters not depending on provincial statutes or peculiar conditions or circumstances to which the common law or imperial statutes could not be applied the law of England was resorted to when any controversy arose. At the time of the testator's death the mortmain laws of England and Upper Canada were identical. Each law had a purely local operation, and by each law local mortgages were impure personalty, and bequests thereof to charity by persons domiciled in the locality invalid. The personal representative could assign or release a mortgage on payment. No case had arisen in which the Ontario Courts had had to determine whether, if a testator domiciled in England bequeathed mortgages of freehold land in Ontario to a charity in England, the Ontario Courts would hold that the provincial statute applied to that bequest, but if a decision were called for in Ontario, it would be based upon what would be decided on the same point in England.

The mortgages contained covenants to pay the money secured.

Sargant, for the Attorney-General. The bequest of the Ontario mortgages is valid. That depends on three propositions of law.

First, the validity or invalidity of a testamentary disposition of movables depends on the law of the testator's domicil. In *Canterbury Corporation* v. *Wyburn* (1) a domiciled Victorian who died on June 13, 1891, bequeathed money to an English corporation for the purchase of English land for charity. The gift, being good by the law of the domicil, was good in England, though of course the assurance would have to follow the English mortmain law when the land was purchased. The same gift by a domiciled Englishman would have been void under the Mortmain and Charitable Uses Act, 1888 (51 & 52 Vict. c. 42), which was then in force. That Act, however, merely consolidated the previous Acts, and the decision would have been the same under the Mortmain Act, 1736.

Secondly, the English mortmain law is purely local and does not extend to gifts of foreign land or money savouring of foreign land: *Attorney-General* v. *Stewart* (2); *Beaumont* v. *Oliveira*. (3) The common form of inquiry as to impure personalty is limited to personalty connected with land "in England and Wales": Seton on Judgments, 6th ed. p. 1334. It has never been extended to foreign land. The law of Ontario is equally local.

Thirdly, the Ontario mortgages are movables, so that the law of domicil applies. Whether they are movables or immovables is strictly a question of Ontario law: *Freke* v. *Lord Carbery* (4); but the Canadian Courts would follow our law on the point, and the question may be determined by considering whether a testator domiciled in Ontario could bequeath English mortgages to charity. If movables, the gift would be valid by Ontario law, which is purely local. If immovables, the English law would apply and the gift would be bad. The question therefore is, are English mortgages movables or immovables? Now in England a mortgage is simply a debt with a collateral security on land. The collateral security no doubt makes the debt

(1) [1895] A. C. 89, 96.
(2) (1817) 2 Mer. 143.
(3) (1869) L. R. 4 Ch. 309.
(4) L. R. 16 Eq. 461, 467.

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impure personalty, but it does not make it land or immovable. Before the Naturalization Act, 1870 (33 & 34 Vict. c. 14), an alien could not hold or devise English land, but surely he could hold and bequeath an English mortgage.

For the purpose of probate duty a mortgage debt is situate where the specialty is, not where the land is: *Stamps Commissioner* v. *Hope* (1); and for the purpose of the Finance Act, 1894 (57 & 58 Vict. c. 30), foreign mortgages are movables: *Lawson* v. *Inland Revenue Commissioners.* (2)

Hon. E. C. Macnaghten, K.C., and *Heckscher*, for the next of kin. In *Canterbury Corporation* v. *Wyburn* (3) there was a bequest of money. The law of the domicil applied, and the English law did not operate till the land was bought.

Here there is a bequest of mortgages, which are really immovables, and the Canadian law applies. We do not suggest that there is any difference between the English and Canadian law on the point, and we admit that the question is the same as the question whether a foreigner can bequeath an English mortgage to charity. This we contend he cannot do, on the ground that a mortgage is immovable. The following are instances of immovables:—Scottish heritable bonds: *Jerningham* v. *Herbert* (4); *In re Fitzgerald* (5); leaseholds: *Freke* v. *Lord Carbery* (6); *Duncan* v. *Lawson* (7); rent-charges for lives: *Chatfield* v. *Berchtoldt* (8); title deeds: Dicey on the Conflict of Laws, 2nd ed. p. 497. A mortgage must surely come within the same category. It is really an interest in land within the Mortmain Act, 1736: *Attorney-General* v. *Meyrick* (9); *In re Watts.* (10) The debt is so inseparably connected with the land that the mortgagee cannot enforce it unless he has the land to reconvey. The mortgagee's interest is an asset in the jurisdiction where the land is situate: *Walsh* v. *Reg.* (11) The text-writers treat mortgages as immovables. Dicey on the Conflict of Laws, 2nd ed. p. 76, says "Immovable property includes all rights over things

(1) [1891] A. C. 476.
(2) [1896] W. N. 145; [1896] 2 I. R. 418.
(3) [1895] A. C. 89, 96.
(4) (1828) 4 Russ. 388.
(5) [1904] 1 Ch. 573.
(6) L. R. 16 Eq. 461, 467.
(7) 41 Ch. D. 394, 396.
(8) (1872) L. R. 7 Ch. 192.
(9) (1750) 2 Ves. Sen. 44, 47.
(10) (1885) 29 Ch. D. 947.
(11) [1894] A. C. 144.

which cannot be moved, whatever be the nature of such rights or interests." Story on the Conflict of Laws, 8th ed. p. 629, s. 447, specifically includes mortgages in his enumeration of immovables. See also Westlake's Private International Law, 4th ed. ss. 156 to 165.

W. M. Cann, for the executor. In *Bent* v. *Young* (1) Shadwell V.-C. expressed (obiter) an opinion that on an English bill for redeeming a foreign mortgage the lex situs would be applied in taking the account against a transferee, who by the lex situs could only hold the mortgage as security for the amount paid on the transfer.

Sargant in reply. In *Jerningham* v. *Herbert* (2) it was held that an English will did not pass a Scottish heritable bond, because in substance it was Scottish land. But if an English mortgage is land, it follows that before the Wills Act, 1837 (1 Vict. c. 26), a will bequeathing an English mortgage would have required three witnesses, and that a French or Scottish holograph will at the present day would not pass an English mortgage. This cannot be so. The broad question is whether mortgages are movables or immovables. The solution of this problem will determine whether the law of domicil or the local law applies. Then and not till then will the local question of mortmain arise. In other words, the local mortmain laws ought not to be looked at until the principal question is determined. This was really the ratio decidendi of *Canterbury Corporation* v. *Wyburn*. (3) If the law of domicil applies the gift is good, and the realization of the security is a mere matter of procedure. The personal remedy will probably be sufficient.

Cur. adv. vult.

June 4. SWINFEN EADY J. This is a summons by the Attorney-General to vary the Master's certificate. The Master has certified that $16,340 invested on mortgage of freehold properties in Canada (the value of the mortgages on February 22, 1888, the date of the testator's death, being 3348*l.*) was attributable to impure personalty, and the summons seeks to vary

(1) (1838) 9 Sim. 180, 190. (2) 4 Russ. 388.
(3) [1895] A. C. 89, 96.

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this finding and to have it determined that the mortgage debts in question are pure personalty. The testator gave his residuary estate to his wife for life, and on her death he gave one third part of it in charity. The testator's widow died on December 4, 1906. By an order of June 3, 1908, it was determined that the bequest of the one third share created a valid charitable trust so far as regards such portion of the share as consisted of pure personalty, and an inquiry on the subject was directed, and it is in answer to that inquiry that the Master has certified that the mortgages in question are impure personalty. The testator was domiciled in England. The mortgages in question are five in number, all legal mortgages of freehold land in the city of Toronto, in the Province of Ontario, Canada.

It is not disputed that the law of Ontario at the time of the testator's death was identical with the law of England with regard to gifts by will of land, and interests in and charges upon land, to charitable uses—the Legislature of Upper Canada having practically by reference put the provisions of the Mortmain Act, 1736, into force in Upper Canada and not having repealed the same at the testator's death, and the decisions arising under it in Ontario being based upon the decisions under it in England. At the time of the testator's death the law of Ontario followed the law of England and treated mortgages of freehold property as impure personalty. The statute in force in England at the testator's death was the Mortmain Act, 1736.

At the date of the testator's death a bequest by a domiciled Englishman of a mortgage debt charged on land in England to a charity would have been invalid; and it is conceded that at the same date a bequest by a person domiciled in Ontario of a mortgage debt charged on land in Ontario would have been invalid. But it is contended that the result of the rule—that in administering personal estate the Court applies the law of the domicil of the testator—is to allow an English testator to bequeath to charity Ontario mortgages and to allow a testator domiciled in Ontario to bequeath in charity English mortgages, seeing that the Statute of Mortmain has only local application and that a mortgage of land abroad cannot be "impure personalty" according to the law of England.

In the argument before me the question whether by the law of England a domiciled Englishman could bequeath to a charity mortgages of freehold land in Ontario has been treated as the same question as whether by the law of Ontario a person domiciled in Ontario could bequeath mortgages on freehold land in England. Indeed, the latter question as to the law of Ontario was put to Mr. Armour, one of the Canadian counsel, for his opinion, asking him what the law of Ontario was on that point, and his answer was that the point had not yet arisen in Canada, but that when the English law had been settled the Canadian Court would adopt the law so laid down. The law would be the same as in England.

It is beyond doubt that a person domiciled abroad could not devise freehold land in England to a charity. In such a case the lex situs governs, and the devise was forbidden by the Mortmain Act, 1736: see *Duncan* v. *Lawson.* (1)

Again, where a person domiciled in Victoria gave by will a sum of money to an English corporation, to be invested in land in England for charitable purposes, it was held that the gift was governed wholly by the law of Victoria, and being valid by that law the executors were bound to pay the money to the English corporation: *Canterbury Corporation* v. *Wyburn.* (2) Such a gift by a person domiciled here would have been invalid under the Mortmain and Charitable Uses Act, 1888.

In that case Lord Hobhouse, in delivering the opinion of the Board, said: "The Attorney-General stated broadly that the prohibitions of the Statutes of Mortmain are an integral part of the English law of real property. So they are; but the question is how far they operate. The suggestion is that they operate to invalidate gifts of money coupled with an obligation to lay them out in land, if they have their origin in a will, though a perfectly valid will. Their Lordships cannot find such a prohibition in the Act. They have reached the conclusion that this will is not invalidated by sub-s. 1. At what point, then, of the transactions does the English law come in? Not between the Victorian testator and his Victorian executor. In their Lordships' view the English law will operate whenever a purchase of land for the

(1) 41 Ch. D. 394, 396. (2) [1895] A. C. 89, 96.

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charitable uses is effected, but no earlier. The assurance of that land must be made in accordance with the provisions of the Act. Anybody may give money for such a purpose in the permitted mode. The testator might himself have bought land in Canterbury and have devoted it to charitable uses quite lawfully. What he might do himself he might do through trustees, by giving money to trustees for the purpose of acquiring land in a lawful way. Is there anything to prevent him from ordering his executors to do the same thing? The answer is that his will is not affected by English law. It is a valid will binding on his executors; and a Victorian Court of Justice should direct them to perform their obligation."

The Mortmain Act, 1736, took away the right to devise land in England for charitable purposes. It applied to land of any tenure, freehold, copyhold, or leasehold. It cannot be doubted that a bequest of a leasehold interest in English land by a domiciled foreigner to a charity, although personal estate, would be invalid: see *Freke* v. *Lord Carbery* (1); *Duncan* v. *Lawson*. (2)

By s. 3 of the Act all gifts and assurances of land, or of any estate or interest therein, or of any charge or incumbrance affecting lands, are void unless made in the manner directed.

Since the section extends to a devise in fee, and to a bequest of a leasehold interest, by a person domiciled abroad, why should it not also extend to a bequest of a mortgage on land? Such a bequest passes a title to the land itself, subject only to such equitable right of redemption as may be subsisting. Subject to this right, the mortgagee is entitled to enter into occupation of the mortgaged land, or if let to receive the rents and profits. In some cases the mortgage debt may be insufficiently secured and the right to redeem of no value. Moreover, the mortgagee has a right to foreclose, and may have a time fixed within which the mortgagor must redeem, if at all. In default of redemption within the time limited the right to redeem is lost. The mortgagee then owns the land freed from any right to redeem.

Having regard to the nature of the interest of a mortgagee of land in the subject-matter of the mortgage, I am of opinion that the prohibition against devising any interest in land, or in any

(1) L. R. 16 Eq. 461. (2) 41 Ch. D. 394, 396.

charge or incumbrance affecting lands, is binding on persons not domiciled here, so as to prevent such persons devising mortgages in fee upon land in England. In my opinion a bequest of a mortgage in fee on English land by a person domiciled abroad to a charity is invalidated by the Mortmain Act, 1736. It is a disposition of land in England, although the mortgage may be subject to redemption. It is directly within "the mischief which the Legislature desired to abate: the increase of land held in mortmain by gifts which may for brevity, and somewhat loosely, be termed death-bed gifts": *Canterbury Corporation* v. *Wyburn*. (1)

The law which renders such a disposition invalid is English law; and that law governs, because the disposition is of land in England. Land is immovable; the rule mobilia sequuntur personam has no application to interests in land; and dispositions of land, although held by way of mortgage, are for the purpose of excluding this rule as much interests in land as where the land is held for life or years.

In Story on the Conflict of Laws, ch. 10, s. 447, 8th ed. p. 629, it is thus stated: "What are to be deemed immovables. Here, as we have already seen, not only lands and houses, but servitudes and easements, and other charges on lands, as mortgages and rents, and trust estates, are deemed to be, in the sense of law, immovables, and governed by the lex rei sitæ." These "may be deemed universally to partake of the nature of immovables, or (as the common law phrase is) to savor of the realty." And Westlake's Private International Law, 4th ed. s. 160, is to the same effect.

The bequest of a term of years in land for the purpose of raising a sum of money, or the bequest of a sum of money charged on land with powers of raising the same, is as much a bequest of an interest in land as a bequest of an absolute term of years. Upon this point no valid distinction can be drawn between the creation of a term by the testator for the purpose of raising money and the bequest of a term for the same purpose already created and subsisting in the testator. Both are equally within the mischief of the Mortmain Act, 1736.

Following the opinion of Mr. Armour, that if a decision were

(1) [1895] A. C. 94.

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called for in Ontario it would be based upon what would be decided on the same point in England, I am of opinion that a bequest by a person domiciled here of mortgages in fee on land in Ontario to a charity is invalid. It is a disposition by will of an interest in land in Ontario forbidden by the law of that province. The Master has arrived at the proper conclusion, and the summons to vary the certificate is dismissed.

Solicitors: *Treasury Solicitor*; *Charles Sawbridge & Son.*

G. R. A.

SWINFEN EADY J.
1910
July 14.

In re BRIDGWATER'S SETTLEMENT. PARTRIDGE *v.* WARD.

[1910 B. 949.]

Deed—Assignment for Value—Defective Title—Subsequent Acquisition of Good Title—Equitable Estoppel.

If an assignor with a defective title purports and intends to assign property for value, any interest subsequently acquired by him in that property is available in equity to make the assignment effectual, even though the defect in title is apparent on the face of the assignment.

Noel v. *Bewley*, (1829) 3 Sim. 103, 116, and *In re Hoffe's Estate Act*, 1855, [1900] W. N. 114; 82 L. T. 556, followed and applied.

ORIGINATING SUMMONS.

By an ante-nuptial settlement dated April 6, 1853, and made between the wife of the first part, the husband of the second part, and a trustee of the third part, a reversionary interest in 6000*l.* to which the wife was entitled on the decease of her mother and certain railway shares were settled upon trust for the wife and husband successively for life with the usual trusts for the children of the marriage, and in default of children (which happened) in trust for the wife's appointees by deed or will, and in default of appointment for her statutory next of kin.

On March 17, 1865, the wife appointed 2000*l.* on certain trusts subject to the life interests of herself and her husband.

On June 17, 1874, the wife died intestate and without having had issue, and without any further exercise of her power of appointment. Her mother and her brother were her statutory

next of kin and entitled to the settled fund in equal moieties subject to the life interests and the appointed 2000*l.*

By a mortgage dated April, 1876, and made between the wife's brother, hereinafter called the mortgagor, of the first part, his son of the second part, and certain mortgagees of the third part, after reciting (inter alia) the settlement of April 6, 1853, and reciting the death of the wife without issue, and erroneously reciting that no appointment had been made by the wife under her power, and reciting that the wife's mother was still living and was then aged eighty-eight and the husband was also living and aged fifty, and reciting that the mortgagor was indebted to the mortgagees in a sum of 3859*l.* and had agreed to secure the same by an assignment of (inter alia) all his estate and interest under the said settlement, the mortgagor assigned to the mortgagees (inter alia) all that the absolute reversionary estate and interest of him the mortgagor to which by virtue of the thereinbefore recited settlement of April 6, 1853, and in the events that had happened of the wife having died without having had issue and without having made any appointment in exercise of the power thereby reserved to her, he the mortgagor "as sole next of kin" of the wife was beneficially entitled immediately expectant on the decease of the survivor of the wife's mother and the husband of and in the several trust moneys, funds, and securities then held upon the trusts of the said settlement and all the estate, right, title, and interest whatsoever of him the mortgagor in, to, or out of the said trust moneys, funds, and securities, to hold the same unto the mortgagees by way of mortgage for securing the repayment of the said sum of 3859*l.* and interest. The mortgage contained covenants for title and further assurance.

The wife's mother died on January 4, 1878, intestate, leaving the mortgagor her sole next of kin. The mortgagor died on April 21, 1878, intestate.

On May 1, 1878, the mortgagor's widow took out administration to his estate, and on August 13, 1878, to his mother's estate.

In 1881 the mortgaged property was sold under the power of sale.

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The husband, the surviving life tenant, died on September 8, 1909, and the fund fell into possession.

This summons was issued to determine (inter alia) whether the beneficial interest in the entire fund less the 2000*l.* appointed belonged to the persons deriving title under the mortgage, or whether they were only entitled to the mortgagor's original moiety and had no claim on the mother's moiety.

W. E. Vernon, for the executors by representation of the trustee of the settlement.

Hon. Frank Russell, K.C., and *E. P. Hewitt*, for the persons deriving title under the mortgage. The mortgagor clearly purported and intended to assign the entire fund, his mother's interest being overlooked. The mortgagor having subsequently acquired a good title except as to the 2000*l.* appointed, the Court will make that good title available to make the assignment effectual: *Smith* v. *Baker* (1); *In re Hoffe's Estate Act*, 1855. (2)

[SWINFEN EADY J. In those cases the grantor acquired a new title to specific real estate or specific money in Court deemed to be real estate. In the present case he only acquired a title to the clear residue of his mother's personalty after paying creditors.]

That is so, but he was liable to make good his assignment to the extent of any interest he acquired: *Noel* v. *Bewley*. (3) "As regards substantial proprietorship the right of the next of kin remains clear to every item forming the personal estate of the intestate, subject only to those paramount claims of creditors": *Cooper* v. *Cooper*. (4)

Hon. E. C. Macnaghten, K.C., and *Ward Coldridge*, for the mortgagor's widow, administratrix of the mortgagor and his mother. The recital that there had been no appointment was erroneous and no question arises as to the 2000*l.* But in other respects the recitals were accurate and shew clearly that the wife's mother was alive. It was therefore apparent on the face

(1) (1842) 1 Y. & C. Ch. 223, 229.
(2) [1900] W. N. 114; 82 L. T. 556.
(3) 3 Sim. 103, 116.
(4) (1874) L. R. 7 H. L. 53, 65.

of the deed that the mortgagor was only entitled to one moiety of the fund. In the face of these recitals the words "sole next of kin" in the parcels are an obvious mistake and ought not to be treated as implying an intention to assign the entire fund. Even if that intention existed, it was on the face of the deed ineffectual, and the doctrine of *Noel* v. *Bewley* (1) has never been applied to such a case.

SWINFEN EADY J. By the Bridgwater settlement of 1853 a reversionary interest to which the wife was entitled on the decease of her mother was settled with other property upon trust for the wife and husband successively for life, and in default of children (which happened) in trust for the wife's appointees by deed or will, and in default of appointment for her statutory next of kin.

The wife appointed 2000*l.* by deed, but did not otherwise exercise her power. She died intestate in 1874, leaving her mother and brother her statutory next of kin. They were entitled in equal moieties to the fund subject to the two life interests of her mother and her husband and subject to the appointed 2000*l.* That was the state of the title when the brother executed the mortgage of 1876.

This mortgage recited the settlement and the death of the wife without appointing. That was erroneous. It then recited that the wife's mother and husband were still living, stating their ages, but having regard to the position of this recital, and the statement of ages, it is evident that it was only inserted to shew their interests as life tenants. The mortgagor then assigned his interest by the description on which the whole question turns.

Now the deed proceeded on two erroneous assumptions. In the first place it recited that the wife had died without appointing, when in fact she had appointed 2000*l.* by deed. Secondly it stated that the mortgagor was "sole next of kin" of the wife, when in fact her mother was living.

The mortgagor then purported to assign the absolute reversionary estate and interest to which, by virtue of the settlement and in the events that had happened of the wife

(1) 3 Sim. 103, 116.

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having died without having had issue and without appointing, he the mortgagor "as sole next of kin" of the wife was beneficially entitled immediately expectant on the decease of the survivor of the wife's mother and the husband in the several trust moneys, funds, and securities then held upon the trusts of the said settlement.

I am of opinion that according to the true construction of this deed what the mortgagor intended to assign was the entirety of the trust fund subject to the two life interests. Erroneously thinking that there had been no appointment and that he was sole next of kin, he purported and intended to assign the entirety subject to those life interests.

That being in my opinion the true construction of the deed, what effect can be given to it? As to the 2000*l.* already appointed it is of course inoperative. The residue is in a different position. Although at the date of the deed the mortgagor was only entitled to one moiety of the property he purported and intended to assign, he subsequently acquired the other moiety as sole next of kin of his mother, subject to the claims of her creditors.

In these circumstances the decisions of Shadwell V.-C. in *Noel* v. *Bewley* (1) and Kekewich J. in *In re Hoffe's Estate Act*, 1855 (2) are applicable, and the beneficial interest in the entire fund less the 2000*l.* appointed now belongs to the persons deriving title under the mortgage, either under the covenant for further assurance, or on the broader ground preferred by Shadwell V.-C. and Kekewich J., that though the assignment was of a defective title, yet as the assignor afterwards acquired a good title, the Court will make that good title available to make the assignment effectual. The mother's administratrix must give a receipt for her moiety.

Solicitors: *Stow, Preston & Lyttelton, for Colborne, Coulman & Lawrence, Newport, Mon.; Windybank, Samuell & Lawrence.*

(1) 3 Sim. 103, 116. (2) [1900] W. N. 114; 82 L. T. 556.

G. R. A.

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May 11, 26.

[1909 W. 3362.]

Local Government—Agreement by Local Authorities for Joint Use of Hospital—Management Expenses apportioned—Notice by one Local Authority to determine Agreement—Validity of Notice—Judgment for Arrears of Management Expenses—Excusable Delay—Mandamus to levy retrospective Rate—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *s.* 210—*Adjustment of Liabilities—Local Government Act*, 1888 (51 & 52 *Vict. c.* 41), *s.* 62.

Under s. 210 of the Public Health Act, 1875, which corresponds with s. 89 of the Public Health Act, 1848, and enacts that a retrospective rate may be levied to pay charges and expenses incurred within six months of the making of the rate, a judgment, obtained in an action brought to enforce a liability incurred more than six months before the commencement of the action, itself operates as a charge within the meaning of the section, and a mandamus may go to levy a retrospective rate to satisfy such judgment where the delay in bringing the action was under the circumstances excusable.

Under the terms of a deed made in 1885 the predecessors in title of the plaintiffs and of the defendants, and the corporation of B., were entitled to the joint use of a hospital, and the expenses of maintaining the hospital were yearly apportioned between and paid by the several authorities. In 1898 another deed was made between the same authorities or their successors by which the provisions of the deed of 1885 as to the management of the hospital were varied, and it was provided that that agreement might be determined by a six months' notice in writing. Under the terms of a third deed made in 1905 between the plaintiffs and the defendants and the corporation, and stated to be supplemental to the two previous deeds, the corporation withdrew and were released from all liability under the deeds of 1885 and 1898, and the provisions for the management of the hospital were again varied. In April, 1906, the defendants gave notice under the deed of 1898 to determine the three deeds and ceased to use the hospital and to contribute to its maintenance. After long negotiations which terminated in November, 1909, the plaintiffs in December, 1909, brought an action to recover from the defendants their proportion of the management expenses of the hospital for the three years prior to March 31, 1909:—

Held, that the notice was invalid and that the deeds of 1885 and 1905 were still subsisting, and constituted an agreement adjusting liabilities and expenses within the meaning of s. 62 of the Local Government Act, 1888, and that the defendants were not entitled to have the questions between themselves and the plaintiffs referred to arbitration under sub-s. 2 of that section.

Held, also, that the delay in commencing the action was in the

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circumstances excusable, and that the plaintiffs were entitled to judgment for the arrears and to a mandamus ordering the defendants to levy a rate to satisfy the judgment and interest.

Principle of *Reg.* v. *Rotherham Local Board*, (1858) 8 E. & B. 906, and *Worthington* v. *Hulton*, (1865) L. R. 1 Q. B. 63, applied.

ACTION.

This was an action by the Wolstanton United Urban District Council and two other district councils to enforce payment by the Tunstall Urban District Council and the borough of Stoke-on-Trent of their contribution to or rateable proportion of the cost of maintaining and managing a hospital in these circumstances.

By a deed dated June 1, 1885 (hereafter called the first deed), and made between the Wolstanton and Burslem Rural Sanitary Authority (hereafter called the sanitary authority) of the first part, the mayor, &c., of the borough of Burslem (hereafter called the corporation) of the second part, and the Tunstall Local Board of the third part, after reciting an agreement between the parties to the effect that the sanitary authority should purchase a site and should erect thereon a hospital at a cost not exceeding 3500*l.* for the reception and treatment of the sick of their respective districts, and that the aforesaid cost and the costs and expenses of managing and maintaining the hospital when erected should be contributed by the parties respectively pro rata according to their respective populations, it was mutually agreed between the parties (clause 1) that the sanitary authority should forthwith obtain the sanction of the Local Government Board to borrow the sum of 3500*l.* on the security of the rates of their district and should acquire a site for the erection of the hospital. Clause 2 provided for the erection of the hospital so soon as the site should have been acquired. Clause 3 provided that, so soon as the hospital was built and completed, the sanitary authority should manage it. Clause 4 provided that the corporation and the Tunstall Local Board should respectively pay to the sanitary authority a proportionate part of the sum which the sanitary authority should have to pay in liquidation of the said loan of 3500*l.* with interest thereon, and in consideration of such payments and of the payments to be made as thereinafter mentioned

by the corporation and the Tunstall Local Board the sanitary authority thereby agreed to allow the corporation and the Tunstall Local Board "for ever thereafter to have the use of the said hospital for the reception and treatment of their sick." Clause 5 provided that the sanitary authority should efficiently maintain the hospital as therein mentioned, and for that purpose should from time to time ascertain the sum to be provided by the parties and should apportion the same amongst them, and for the effective in-getting and receipt of the said sum or sums according to the said apportionment thereof the sanitary authority should also from time to time (if and so often as it should appear to them to be necessary) issue their precepts to the parties thereto requiring them to pay forthwith or otherwise as in such precepts to be directed the said sum or sums into the hands of the treasurer of the sanitary authority upon his sole receipt. Clause 6 provided that the sanitary authority should provide the salaries and remunerations of the officials and other persons employed or engaged in the hospital. Clause 7 provided that the parties thereto would severally pay the various sums from time to time or at any time assessed upon or apportioned to them respectively by the sanitary authority under the several provisions therein contained for the effective maintenance of the hospital and would indemnify in their said several proportions the sanitary authority from all liability for such sums.

In accordance with the terms of this deed the sanitary authority with the sanction of the Local Government Board raised 3500*l.* on the security of the rates of their district and therewith purchased a site and erected thereon a hospital known as the Bradwell Sanatorium. The loan was repayable by instalments with interest extending over thirty years.

In 1894, under and by virtue of the Local Government Act, 1894, the Wolstanton Rural District Council became the successors of the sanitary authority, and the defendants the Tunstall Urban District Council (hereafter called the Tunstall Council) became the successors of the Tunstall Local Board; and by a deed dated June 16, 1898 (hereafter called the second deed), and made between the Wolstanton Rural District Council of the first part, the corporation of the second part, and the Tunstall Council of

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the third part, clause 3 of the first deed was annulled and the management of the hospital was vested in a joint committee to be formed in manner therein mentioned, and it was agreed that that agreement might be determined by any of the said parties giving to the other or others of them six calendar months' notice in writing.

By an order made in February, 1902, by the county council of Staffordshire under s. 57 of the Local Government Act, 1888 (which order was duly confirmed by the Local Government Board and came into operation on March 31, 1904), some of the parishes of the Wolstanton rural district were constituted into an urban district called the Wolstanton united urban district, certain other of its parishes or parts of parishes were transferred to the Tunstall urban district, certain other of its parishes or parts of parishes were transferred to the Kidsgrove urban district, and certain other of its parishes or parts of parishes were transferred to the Smallthorne urban district; and it was also provided by the said order that the Wolstanton Rural District Council should be abolished and cease to exist, and that all the rights, liabilities, and obligations which were attached to or vested in that council in relation to the parishes and parts of parishes included in the respective urban districts should be transferred to and vested in the respective urban district councils.

By a deed dated August 2, 1905 (hereafter called the third deed), and made between the plaintiffs the Wolstanton United Urban District Council of the first part, the corporation of the second part, the defendants the Tunstall Council of the third part, the plaintiffs the Smallthorne Urban District Council of the fourth part, and the plaintiffs the Kidsgrove Urban District Council of the fifth part, and expressed to be supplemental to the first and second deeds, arrangements were made under which the corporation withdrew from the agreements comprised in the first and second deeds and were released from all their liabilities and obligations under those deeds, and the plaintiffs the Kidsgrove Urban District Council and the Smallthorne Urban District Council were admitted to the benefits of and undertook certain obligations with respect to the Sanatorium under the first

and second deeds, and the provisions with respect to the management of the Sanatorium were again varied.

The financial year of the hospital ended on March 31, and every year the sanitary authority or the joint committee made an estimate in advance of the management expenses for the ensuing twelve months, and every May issued their precept to the several authorities for their respective proportions of such expenses and of the instalments of the loan and interest, which were from time to time duly paid; but on April 11, 1906, the defendants, purporting to exercise the power in clause 5 of the second deed, gave a six months' notice to the other authorities to determine the three deeds on the ground that the hospital had become inadequate for the accommodation of patients from their district, and on the expiration of the notice in the following October they ceased to use the hospital and declined to contribute any longer to the management expenses, but they paid under protest their proportion of the instalments of the loan and interest. The plaintiffs insisting that the notice was invalid, negotiations ensued, and the defendants applied to the Local Government Board under s. 68 of the Local Government Act, 1894, to adjust the matters in difference between the plaintiffs and themselves, but eventually the Board in November, 1909, definitely declined to interfere. The plaintiffs then commenced this action in December, 1909, and claimed (1.) a declaration that the first and third deeds were valid and subsisting and that the defendants had no power to determine them; (2.) judgment for the defendants' proportion of the management expenses of the hospital for the three years ending March 31, 1909 (which amounted to upwards of 1142*l.*), with interest thereon; (3.) damages; and (4.) a mandamus commanding the defendants to levy a rate sufficient to satisfy the judgment and the costs of the action.

By their defence the defendants the Tunstall Council relied on their notice of April 11, 1906, and pleaded the Stoke-on-Trent Order, 1908, which was confirmed by the Local Government Board's Provisional Order Confirmation (No. 3) Act, 1908, and provided that the area of the Tunstall urban district and the areas of five other districts should be united with the borough

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of Stoke-on-Trent, and that the defendants the Tunstall Council and certain other local authorities should be dissolved and cease to exist. This order also provided (art. 2) that the order should come into operation on March 31, 1910; (art. 22) that any action or proceeding which at the commencement of the order was pending against the Tunstall Council in relation exclusively to any part of the Tunstall urban district should not be in any wise prejudicially affected by reason of the making of the order, but might be continued, prosecuted, and enforced against the corporation of the borough of Stoke-on-Trent, and that all contracts, deeds, and agreements entered into or made by the Tunstall Council or their predecessors in relation exclusively to any part of the Tunstall urban district should be of as full force and effect against or in favour of the corporation of the borough and might be continued and enforced as fully and effectually as if the corporation of the borough had been a party thereto; art. 25 transferred and vested all the property and liabilities of the Tunstall urban district to and in the corporation of the borough; and art. 26 provided for account to be taken between the corporation of the borough, and six councils incorporated with it under the order, of their respective assets and liabilities, and that, if any question should arise as to whether any particular asset or liability was to be included in such account, such question should be determined by the Local Government Board. And the defendants submitted that the whole question raised by the plaintiffs was one that ought to be dealt with in an adjustment of liabilities under art. 26 of the Stoke-on-Trent Order, which would come into operation on March 31, 1910. In the alternative they submitted that the question of their liability should be adjusted in accordance with the provisions of s. 68 of the Local Government Act, 1894.

By an order of course made in April, 1910, the council of the borough of Stoke-on-Trent were added as defendants to the action, which now came on for trial.

Felix Cassel, K.C., and *W. H. Cozens-Hardy*, for the plaintiffs. The deed of 1885 operates as a continuing agreement, and

neither in that deed nor in either of the two subsequent deeds is any power given, either expressly or by implication, to any of the authorities to determine that agreement. The power in the second deed is only intended to relate and does only apply to the provisions for the management of the hospital.

[They were stopped.]

Peterson, K.C., and *A. A. Bethune*, for the defendants. After the expiration of their notice the defendants were absolutely released from all liability under the deeds. The first deed is fully recited in the second deed, and the third deed is expressly made supplemental to the first and second, so that the three deeds must be treated as constituting one agreement, and the power to determine is incorporated into the first deed and still exists.

[NEVILLE J. The second deed only deals with and alters the method of managing the hospital, and I think that by clause 5 it was intended that that method might be revoked, or varied from time to time. That is very different to saying that any party may put an end to their liabilities and obligations under the first deed by a six months' notice. I do not think that that was the intention of the second deed.]

Then as to the claim for adjustment of liabilities. Under the provisions of the order of 1908 accounts ought to be taken between the plaintiffs and defendants.

[NEVILLE J. The plaintiffs are not parties to that order and I do not think that they are bound by it.]

Then going back to the order of 1902, the old Wolstanton rural sanitary authority was by that order split up into four urban district councils, and an adjustment of their liabilities was necessary.

[NEVILLE J. Is not that difficulty met by the deed of 1905 ?]

The Tunstall Council did not agree by that deed to take over any liabilities. The Local Government Act, 1894, s. 36, enacts that an order for alteration of boundaries may be made by a county council under s. 57 of the Local Government Act, 1888, and that the order shall be deemed to be an order under the latter Act. The order of 1902 was made under s. 57 of the Act of 1888, and it is submitted that an adjustment of the liabilities

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of the plaintiffs and defendants under the deed of 1885 is necessary, and that the adjustment should be made under s. 62 of the Act of 1888 rather than under s. 68 of the Act of 1894, as pleaded in the defence, and that until an adjustment has been made the defendants' liability cannot be ascertained. Lastly, the plaintiffs may be entitled to judgment for the amount claimed, but not to a mandamus, which is in the discretion of the Court: *Croydon Corporation* v. *Croydon Rural Council.* (1) By ss. 131 and 207 of the Public Health Act, 1875, these expenses are included in the general district rate, and s. 210 of the Act expressly prohibits a rate being levied to pay a charge "incurred" more than six months before the making of the rate. In *Smith* v. *Southampton Corporation* (2) a rate was quashed on the ground that it included charges incurred more than six months before the making of the rate. Here the estimates were made each year in advance, and the plaintiffs ought to have enforced their demand within six months of the issue of the precepts. That was the date when the liability in each year was incurred, and there has been undue delay in commencing the action.

Felix Cassel, K.C., in reply. When there is a bona fide dispute between parties, the word "incurred" in s. 210 means when the liability is finally decided by a judgment in legal proceedings, and the judgment operates as a fresh charge incurred at the date of the judgment and can be enforced by mandamus where there has been no undue delay in commencing the action. There is no direct authority on the section, but on precisely similar words in s. 89 of the Public Health Act, 1848, it was so held in *Reg.* v. *Rotherham Local Board* (3) and *Worthington* v. *Hulton* (4), which are approved in *Julius* v. *Bishop of Oxford.* (5) The observations on s. 210 in *Reg.* v. *Leigh Rural Council* (6) and the *Croydon Case* (7) support this view.

Cur. adv. vult.

May 26. NEVILLE J. By an indenture of June 1, 1885, it was agreed that the Wolstanton and Burslem Rural Sanitary

(1) [1908] 1 Ch. 222; on appeal, [1908] 2 Ch. 321, 327.
(2) [1902] 2 K. B. 244, 249.
(3) 8 E. & B. 906.
(4) L. R. 1 Q. B. 63, 67.
(5) (1880) 5 App. Cas. 214, 244.
(6) [1898] 1 Q. B. 836, 846.
(7) [1908] 2 Ch. 321, 336.

Authority, the predecessors of the plaintiffs, should borrow a sum of 3500*l.* to be charged on their rates for the purpose of establishing a hospital for infectious diseases; and that the Burslem Corporation and the Tunstall Local Board, the predecessors of the defendants, should contribute to the expenses in proportion to their population. The management was to be by the sanitary authority. By an indenture of June 16, 1898, made between the Wolstanton Rural District Council, the successor of the rural sanitary authority, of the first part, the borough of Burslem of the second part, and the Tunstall Urban District Council, the successor of the Tunstall Local Board, of the third part, the terms of the indenture of June 1, 1885, were varied with regard to the management of the hospital; and by clause 5 this agreement was determinable on six months' notice. By an indenture of August 2, 1905, between the Wolstanton United Urban District Council, the successors of the Wolstanton Rural District Council, of the first part, the borough of Burslem of the second part, the Tunstall Urban District Council of the third part, the Smallthorne Urban District Council of the fourth part, and the Kidsgrove Urban District Council of the fifth part, stated to be supplemental to the two indentures previously mentioned, provisions were made for discharging the corporation from all rights and liabilities under the agreements in respect of the hospital, and admitting the Smallthorne and Kidsgrove Councils to the rights and liabilities in respect of the portions of the district served by the hospital taken over by them, and providing for the management of the hospital by a joint committee to be appointed by the Wolstanton Council, the Tunstall Council, the Smallthorne Council, and the Kidsgrove Council; clause 5 providing for an adjustment of representation on the joint committee in accordance with population. No express provision as to contribution by the Tunstall Council is made; and in my opinion their obligation is to be found under the terms of the principal indentures which this supplemental agreement modifies and confirms.

On April 11, 1906, the Tunstall Council served upon the other parties to the agreement notice to determine their rights and liabilities, apparently in reliance upon clause 5 of the deed

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of 1898. The first question to be determined is whether such notice was valid and discharged the Tunstall Council from their obligations under the agreements. In my opinion it was invalid. I think the power to determine applied only to the modifications contained in the deed of 1898, and did not extend to enable the parties to the deed of 1885 to escape from the liabilities they thereby undertook. The defendants, as a further defence to the action, claim a right to an adjustment of the liabilities of the plaintiffs and defendants. This claim is based upon art. 26 of the order confirmed by the Act of 1908, or alternatively upon s. 62 of the Local Government Act, 1888. In my opinion the article referred to does not prevent the enforcement of a claim by third parties; and I am of opinion that the agreement of 1905 was an agreement within the meaning of s. 62, and that sub-s. 2 of that section does not apply. But if regard is to be had to s. 68 of the Local Government Act, 1894, I think the same result follows, because it seems to me that the agreement is also an agreement within the meaning of that section, and that sub-s. 3 of that section does not apply.

This brings me to the final point to be considered; that is, whether the Court should grant the mandamus asked for by the plaintiffs. Under s. 210 of the Public Health Act, 1875, a rate can only be levied retrospectively in order to raise money for the payment of charges and expenses incurred at any time within six months before the making of the rate. It is argued on behalf of the defendants that if a rate were levied, it would be in respect of a charge or expense incurred more than six months before the making of the rate; and consequently to make such a rate would not be authorized by the statute, and cannot be enforced by mandamus. If the time when the contribution became payable is the only time when a charge or expense was incurred in respect of it, this certainly is so, and the mandamus cannot be granted. I think, however, that where a claim has to be enforced by action against an authority under the Public Health Act, 1875, the judgment is itself a charge incurred upon the date of the judgment, and that a rate may lawfully be made for its payment within six months from that date. The granting of a mandamus is, however, discretionary; and where the action

has not been commenced within six months from the commencement of the liability, and no good reason is shewn for the delay, the Court ought not, in the exercise of its discretion, to grant a mandamus. These propositions appear to me to be in accordance with the authorities. In *Reg.* v. *Rotherham Local Board* (1) it was held that a judgment obtained against a local authority was a charge within the meaning of s. 89 of the Act of 1848, and that a rate might be made to defray it within six months of that charge. In *Worthington* v. *Hulton* (2) it was held by a Divisional Court, consisting of Cockburn C.J., Blackburn J., and Mellor J., that a rate might be ordered in aid of a judgment within six months after that judgment was obtained, though the action in which the judgment was obtained was commenced more than six months after the claim accrued, if the delay was shewn not to be undue. In *Reg.* v. *Leigh Rural Council* (3) the Court of Appeal granted a mandamus against the rural district council, the application being made in the same year in which the judgment had been obtained, in an action to recover a claim arising more than a year earlier. There, the only legal limitation which could apply was the rating year under s. 230 of the Public Health Act, 1875; and it is not very clear from their judgments how far the learned judges are considering the legality of the rate, and how far the discretionary exercise of their power to direct a mandamus to issue; but Collins L.J. (4) says that the cases decided under the Public Health Act, 1848, shew, first, that the judgment is a new point of departure which may be looked to in determining whether a rate is retrospective; and, secondly, that where the delay in commencing the action can be satisfactorily explained, the Court may exercise its discretion as to granting a mandamus, although six months have elapsed since the accruing of the cause of action. In *Croydon Corporation* v. *Croydon Rural Council* (5) the Court of Appeal granted a mandamus against the rural authority in respect of a claim which arose more than a year before action

(1) 8 E. & B. 906.
(2) L. R. 1 Q. B. 63.
(3) [1898] 1 Q. B. 836.
(4) Ibid. 846.
(5) [1908] 2 Ch. 321.

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brought. Kennedy L.J. says (1), with regard to the cases of *Reg.* v. *Rotherham Local Board* (2) and *Worthington* v. *Hulton* (3), that "Unless, as was expressly held in the former case, a judgment in an action of debt recovered against a local board constitutes a charge within the meaning of the Public Health Act, 1848, s. 89, and s. 210 of the Public Health Act, 1875, I do not find it quite easy to harmonize those decisions, according to any definite principle, with the statutory provisions." In my opinion both the decisions referred to do proceed upon the ground that a judgment constitutes a charge within the meaning of the sections. As the Lord Justice says, in *Reg.* v. *Rotherham Local Board* (2) it was expressly so held, while in *Worthington* v. *Hulton* (3) Mellor J., in delivering the judgment of the Court, says (4): "The *Rotherham Case* (2) decides that a judgment, when properly obtained, is a charge within the meaning of this section; and when that is decided, the case is within the literal words of the section." In my opinion to interpret the words of s. 210 otherwise would be to read the section as enabling the local authority to defeat the claims of bona fide creditors by keeping them at arm's length until the period of six months from the origin of their claims had expired. This could hardly have been the intention of the Legislature. In this case I think the delay in commencing proceedings was satisfactorily explained, and that the plaintiffs are entitled to the relief claimed in their statement of claim, except damages. The mandamus will be limited to a rate or rates to satisfy the amounts due from the defendants under the deeds, with interest, and the costs of the action.

Solicitors: *Waterhouse & Co., for Sherratt & Nelson, Kidsgrove, Staffs.*; *M. A. Orgill, for Llewellyn & Son, Tunstall, Staffs.*

(1) [1908] 2 Ch. 336.
(2) 8 E. & B. 906.
(3) L. R. 1 Q. B. 63.
(4) Ibid. 67.

H. L. F.

ATTORNEY-GENERAL *v.* CORPORATION OF LEICESTER.

NEVILLE J.
1910
June 13, 14, 15, 20.

[1909 A. 1685.]

Electric Lighting—Municipal Corporation — Statutory Powers — "Supply" of Electricity—"Things necessary and incidental to such supply"—Supplying Lamps and Fittings — Trading—Ultra vires — Injunction—Electric Lighting Act, 1882 (45 & 46 *Vict. c.* 56), *ss.* 2, 4, 6, 10, 12, 18, 24, 25, 32—*Electric Lighting Act*, 1909 (9 *Edw.* 7, *c.* 34), *ss.* 6, 16—*Gasworks Clauses Act*, 1847 (10 & 11 *Vict. c.* 15), *ss.* 6—12, 13, 14, 18—20—*Gasworks Clauses Act*, 1871 (34 & 35 *Vict. c.* 41), *ss.* 38—41, 45, 46.

The Electric Lighting Act, 1882, s. 10, provides that undertakers authorized to supply electricity may "enter into such contracts and generally do all such acts and things as may be necessary and incidental to such supply."

A municipal corporation under the provisions of the Act of 1882 and a provisional order of the Board of Trade were the undertakers for the supply of electricity within their area, and purporting to exercise their statutory powers supplied every description of electrical fittings and apparatus to consumers of electricity:—

Held, that the statutory powers of the undertakers ceased with the delivery of electrical energy at the terminals, i.e., the meter, on the consumer's premises and was complete at that point, and that the general power to do "all such acts and things as were necessary and incidental to such supply" was limited to the generation and delivery of such supply.

Held, also, that the analogy of the supply of gas under the Gasworks Clauses Acts, 1847 and 1871, did not apply to the supply of electricity under the Electric Lighting Acts.

Held, therefore, that the supply of electrical fittings and apparatus for the use of consumers was ultra vires the corporation, and an injunction was granted accordingly.

ACTION.

The defendants were a municipal corporation subject to the Municipal Corporations Act, 1882, and the local authority for the purposes of the Electric Lighting Acts, 1882 and 1888, for the county borough of Leicester; and under the provisions of the said Acts, and a provisional order of the Board of Trade granted in 1890 and confirmed by a special Act the same year, were constituted "the undertakers" for the supply of electricity within the area of their borough.

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The action was by the Attorney-General at the relation of a ratepayer, and paragraph 5 of the statement of claim was as follows:—

"5. The defendants purporting to act in pursuance of powers in that behalf conferred on them have carried on and still carry on the trade or business of providing, selling, supplying, erecting, installing, altering and repairing electric light cables, wires and fittings, electric bells, dynamos and motors for working various machines (*a*) in connection with houses or other buildings within the said borough to which they are supplying or about to supply electricity; (*b*) in connection with houses or other buildings within the said borough to which they are neither supplying nor about to supply electricity; (*c*) in connection with houses and other buildings and to persons resident outside the said borough. The defendants have no power under the above-mentioned statutes or order or otherwise to carry on the said trade or business or any part of it."

The plaintiff further alleged (paragraph 6) that the defendants were unlawfully expending in carrying on the unauthorized trade or business capital moneys borrowed for the purposes of their said undertaking and moneys forming part of their borough fund.

The plaintiff claimed (1.) a declaration that the defendants had no power to carry on the trade or business or any part of such trade or business complained of in paragraph 5; (2.) a declaration that the defendants had no power to expend or use for the purposes mentioned in paragraph 5 or any of them any of their moneys, plant, property, or servants; and (3.) an injunction accordingly in the terms of (1.) and (2.).

The defendants by their defence denied all the plaintiff's allegations in paragraph 5 of the statement of claim and claimed (paragraphs 7 and 8 of the defence) that by virtue of s. 10 of the Electric Lighting Act, 1882 (1), and the order confirmed by the

(1) The Electric Lighting Act, 1882, s. 10, enacts: "The undertakers may, subject to and in accordance with the provisions and restrictions of this Act, and of any rules made by the Board of Trade in pursuance of this Act, and of any license, order, or special Act authorising or affecting their undertaking, and for the purpose of supplying electricity, acquire such lands by agreement, construct such works, acquire such licenses for the use of any patented or protected processes,

special Act they were entitled to do any of the things in the section authorized, and in particular they claimed that they were entitled to do all such things and acts as were necessary or incidental to their duty and right to supply and to the supply of energy within the borough; that under their aforesaid statutory powers they were entitled to supply, and they had in fact been supplying, as reasonably necessary or incidental to or as part of the supply of energy aforesaid for or to the persons taking or about to take energy from them under the said order, mains, services, wires, and fittings used for the taking and consumption of such energy and including bells and motors worked by such energy, and that the supply aforesaid covered the erection, installation, altering and repairing of the things mentioned as and where necessary or incidental to such supply. They disclaimed any right to do and any intention of doing any of the things or acts mentioned in paragraphs 7 and 8 outside the borough, and they further disclaimed the right to do and any intention of doing within the borough any of the things or acts mentioned in paragraph 5 of the statement of claim other than the things or acts specifically claimed in paragraphs 7 and 8 of the defence.

The evidence on behalf of the plaintiff bore out the allegations in paragraph 5 of the statement of claim. It also appeared that in 1898 the defendants opened show-rooms in Milson Lane, Leicester, where they exhibited for sale every kind of appliance in connection with the use of electricity, that the show-rooms had windows facing the street, and any person could go in and purchase any article that he required for use in the consumption of electricity.

No evidence or argument was directed to paragraph 6 of the statement of claim, the Court intimating that that issue depended upon whether or not the defendants were acting within their statutory powers in doing the acts complained of in paragraph 5.

The material sections of the Leicester Electric Lighting Order,

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inventions, machinery, apparatus, methods, materials, or other things, enter into such contracts, and generally do all such acts and things as may be necessary and incidental to such supply."

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1890 (which was the common form of electric lighting provisional orders granted by the Board of Trade under the Electric Lighting Acts, 1882 and 1888), were as follows :—

"2. This Order is to be read and construed subject in all respects to the provisions of The Electric Lighting Acts 1882 and 1888 and of any other Acts or parts of Acts incorporated therewith which said Acts and parts of Acts are in this Order collectively referred to as 'the principal Act' and the several words terms and expressions to which by the principal Act meanings are assigned shall have in this Order the same respective meanings provided that in this Order :—

"The expression 'energy' shall mean electrical energy and for the purposes of applying the provisions of the principal Act to this Order electrical energy shall be deemed to be an agency within the meaning of electricity as defined in The Electric Lighting Act 1882;

"The expression 'power' shall mean electrical power or the rate per unit of time at which energy is supplied;

"The expression 'main' shall mean any electric line which may be laid down by the undertakers in any street or public place and through which energy may be supplied or intended to be supplied by the undertakers for the purposes of general supply;

"The expression 'service line' shall mean any electric line through which energy may be supplied or intended to be supplied by the undertakers to a consumer either from any main or directly from the premises of the undertakers;

"The expression 'distributing main' shall mean the portion of any main which is used for the purpose of giving origin to service lines for the purposes of general supply; . . . .

"The expression 'consumer's terminals' shall mean the ends of the electric lines situate upon any consumer's premises and belonging to him at which the supply of energy is delivered from the service lines."

"4. Subject to the provisions of this Order the undertakers for the purpose of this Order shall be the Mayor Aldermen and Burgesses of the County Borough of Leicester."

Sect. 5 defined the area of supply.

"21. The undertakers shall upon being required to do so by the owner or occupier of any premises situated within fifty yards from any distributing main of the undertakers in which they are for the time being required to maintain or are maintaining a supply of energy for the purposes of general supply to private consumers under this Order or any regulations and conditions subject to which they are authorized to supply energy under this Order give and continue to give a supply of energy for such premises in accordance with the provisions of this Order and of all such regulations and conditions as aforesaid and they shall furnish and lay down any electric lines that may be necessary for the purpose of supplying the maximum power with which any such owner or occupier may be entitled to be supplied under this Order subject to the conditions following (that is to say):—

"The cost of so much of any electric line for the supply of energy to any owner or occupier as may be laid upon the property of such owner or in the possession of such occupier and of so much of any such electric lines as it may be necessary to lay for a greater distance than sixty feet from any distributing main of the undertakers although not on such property shall if the undertakers so require be defrayed by such owner or occupier;

"Every owner or occupier of premises requiring a supply of energy shall—

"Serve a notice upon the undertakers specifying the premises in respect of which such supply is required and the maximum power required to be supplied and the day (not being an earlier day than a reasonable time after the date of the service of such notice) upon which such supply is required to commence; and

"Enter into a written contract with the undertakers (if required by them so to do) to continue to receive and pay for a supply of energy for a period of at least two years . . . .

"Provided also that if the owner or occupier of any such premises as aforesaid uses any form of lamp or burner or uses the energy supplied to him by the undertakers for any purposes or deals with it in any manner so as to unduly or improperly interfere with the efficient supply of energy to any other person

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by the undertakers the undertakers may if they think fit discontinue to supply energy to such premises so long as such user continues.

"Provided also that the undertakers shall not be compelled to give a supply of energy to any premises unless they are reasonably satisfied that the electric lines fittings and apparatus therein are in good order and condition and not calculated to affect injuriously the use of energy by the undertakers or by other persons.

"If any difference arises under this section as to any improper use of energy or as to any alleged defect in any electric lines fittings or apparatus such difference shall be determined by arbitration."

Sects. 22 to 25 provided for the maximum power of supply and the methods of charging for the supply.

"26. Subject to the provisions of this Order and of the principal Act and to the right of the consumer to require that he shall be charged according to some one or other of the methods above mentioned the undertakers may make any agreement with a consumer as to the price to be charged for energy and the mode in which such charges are to be ascertained and may charge accordingly."

"31. An electric inspector if and when required to do so by any consumer shall from time to time on payment by such consumer of the prescribed fee test the variation of electric pressure at the consumer's terminals or make such other inspection and testing of the service lines apparatus and works of the undertakers upon the consumer's premises as may be necessary for the purpose of determining whether the undertakers have complied with the provisions of this Order and the regulations and conditions subject to which they are for the time being authorised to supply energy."

"40. The amount of energy supplied by the undertakers to any ordinary consumer under this Order or the electrical quantity contained in such supply (according to the method by which the undertakers elect to charge) in this Order referred to as 'the value of the supply' shall except as otherwise agreed between such consumer and the undertakers be ascertained by means of

an appropriate meter duly certified under the provisions of this Order."

"43. Where the value of the supply is under this Order required to be ascertained by means of an appropriate meter the undertakers shall if required so to do by any consumer supply him with an appropriate meter and shall if required so to do fix the same upon the premises of the consumer and connect the service lines therewith and procure such meter to be duly certified under the provisions of this Order and for such purposes may authorise and empower any officer or person to enter upon such premises and execute all necessary works and do all necessary acts. Provided that previously to supplying any such meter the undertakers may require such consumer to pay to them a reasonable sum in respect of the price of such meter or to give security therefor or (if he desires to hire such meter) may require him to enter into an agreement for the hire of such meter as hereinafter provided."

"45. Every consumer shall at all times at his own expense keep all meters belonging to him whereby the value of the supply is to be ascertained in proper order for correctly registering such value and in default of his so doing the undertakers may cease to supply energy through such meter.

"The undertakers shall have access to and be at liberty to take off remove test inspect and replace any such meter at all reasonable times provided that all reasonable expenses of and incident to any such taking off removing testing inspecting replacing and the procuring such meter to be again duly certified where such re-certifying is thereby rendered necessary shall if the meter be found not to be in proper order be paid by the consumer but if the same be in proper order all expenses connected therewith shall be paid by the undertakers.

"46. The undertakers may let for hire any meter for ascertaining the value of the supply and any fittings thereto for such reasonable remuneration in money and on such terms with respect to the repair of such meters and fittings and for securing the safety and return to the undertakers of such meter and fittings as may be agreed upon between the hirer and the undertakers or in case of difference decided by the Board of Trade and

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such remuneration shall be recoverable by the undertakers summarily as a civil debt."

"50. In addition to any meter which may be placed upon the premises of any consumer to ascertain the value of the supply the undertakers may from time to time place upon his premises such meter or other apparatus as they may desire for the purpose of ascertaining or regulating either the amount of energy supplied to such consumer or the number of hours during which such supply is given or the maximum power taken by such consumer or any other quantity or time connected with the supply. Provided that such meter or apparatus shall be of some construction and pattern and shall be fixed and connected with the service lines in some manner approved by the Board of Trade and shall be supplied and maintained entirely at the cost of the undertakers and shall not except by agreement be placed otherwise than between the mains of the undertakers and the consumer's terminals."

Felix Cassel, K.C., and *M. Drucquer*, for the plaintiff. The Order of 1890 does not contain, as many private Acts do contain, any express power enabling the defendants to supply to consumers any electrical fittings, lamps, appliances, or apparatus; but the real issue is whether the defendants, as the undertakers under the Acts and Order for the supply of electricity in their area, have power to do the acts and things complained of on the ground that they are necessary and incidental to the undertaking that they are authorized to carry on. On the evidence the defendants are carrying on what is really nothing more nor less than the business of electrical contractors, and that, it is submitted, is unauthorized and ultra vires. The undertaking they were established to carry on, and alone are authorized to carry on, is the "supply" of electrical energy, and on the construction of the Acts and Order they have no power to go beyond the business of supply and are debarred from entering on the business of supplying fittings, wirings, materials and articles which may be convenient and advantageous for use in connection with the consumption of electricity. Their powers to supply electricity stop with the delivery of electrical energy at the

terminals, i.e., the meter, on the consumer's premises, and when the consumer turns on his main switch and takes the current on to his wires, then from that point onwards their powers cease. Beyond that point they have no power to do anything, and their power to do "acts and things necessary and incidental to such supply" is limited to the various things which are incidental to the generation of electrical energy and the delivery of it to the consumer. They have no power to do anything in connection with the user and consumption of electricity beyond the terminals on the consumer's premises. Having regard to ss. 2, 4, 6, 10, 12, 18, 24, 25, and 32 of the Act of 1882 and ss. 2, 21, 26, 40—46 of the Provisional Order, it is submitted that the Acts and Order throughout clearly contemplate the supply of electricity by the undertakers for the use of the consumer. Reliance may be placed on s. 13 of the Gasworks Clauses Act, 1847, which expressly authorizes gas undertakers to supply fittings, lamps, and burners to gas consumers; but that section is not incorporated by s. 12 of the Electric Lighting Act, 1882, nor is any similar power given by the Electric Lighting Act or the Order. Where fittings are mentioned in ss. 24 and 25 of the Act of 1882 they are the fittings "belonging to the undertakers" for the purposes of supply, and do not extend to fittings, &c., to be sold to the consumer. Further, under the Order any occupier within 50 yards of the main may compel the undertakers to supply electrical energy to his premises, and they have no power to make any charge except for the energy supplied and for the meter sold or let and its fittings. Illustrations of the distinction between things incidental or necessary to the exercise of statutory powers and things convenient and advantageous to the carrying on of a statutory undertaking are *Attorney-General* v. *Mersey Ry. Co.* (1); *Attorney-General* v. *Manchester Corporation* (2); *Attorney-General* v. *London County Council* (3); *Attorney-General* v. *West Gloucestershire Water Co.* (4)

Danckwerts, K.C., and *McCardie*, for the defendants. The corporation do not claim and do not intend to supply electrical

(1) [1906] 1 Ch. 811; [1907] 1 Ch. 81; [1907] A. C. 415.
(2) [1906] 1 Ch. 643, 656.
(3) [1901] 1 Ch. 781; [1902] A. C. 165, 168.
(4) [1909] 2 Ch. 338.

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energy outside their area, but they do contend that they are entitled to undertake the wiring of premises which are or are about to be supplied with electricity by them and to sell apparatus and fittings to persons who wish to use such apparatus and fittings for the purpose of taking and using electricity supplied by the corporation, and it is submitted that the Acts and Order do authorize that position and make it intra vires. We rely on the rule of law referred to in *Attorney-General* v. *Mersey Ry. Co.* (1) that in the case of a company created by statute for a specific purpose it must be shewn "that the business can fairly be regarded as incidental to or consequential upon the use of the statutory powers," and we say that what the defendants are doing is either impliedly authorized by the Act of 1882 or falls within that rule. In 1882 the electric light industry was in its infancy, and Parliament in dealing with it referred to the only analogy which it had before it, and that was gas supply, and that it did so is shewn by the fact that the provisions of the Act of 1882 are framed in general on the same lines as the Gasworks Clauses Acts, 1847 and 1871, and that it has in many instances used almost the language of those Acts. Further, it has by s. 12 of the Act of 1882 incorporated into that Act various provisions of the Gasworks Clauses Acts with the necessary modifications. Moreover, the business of supplying gas and the business of supplying electricity in the main lines have common features. In the one the gas is manufactured at a central station and is sent out from there through mains and service pipes to houses and consumers, and the gas is supplied under pressure all the way up to the point of consumption. In the case of electricity there is the central generating station with its mains and service lines, and the service lines are ultimately connected, as in the case of gas, with a lamp or burner, and there is also the pressure up to the point of consumption in order that the electric energy may be utilized there. Therefore in either case the whole supply is exactly analogous. The supply of electrical energy is not complete until it reaches the point of consumption. It is said that "the supply" is complete at the consumer's terminal. That assumes that "supply" is the same thing as "sell and

(1) [1907] 1 Ch. 81, 92; [1907] A. C. 415.

deliver," but in *Gaslight and Coke Co.* v. *South Metropolitan Gas Co.* (1) the House of Lords held that the supply of gas continues to the point of consumption, i.e., the burner, because the supply is not complete until it gets there. If the supply of either gas or electricity is not complete until it gets to the place of consumption, then it is clear that everything which is used for the purpose of getting it there is part of the supply. In the next place, the Legislature has assumed that what it has authorized to be done in the Act of 1882 includes the supply of fittings and electric lines in the houses. You get that, first, in the importation by s. 12 of the Act of the provisions of the Gasworks Clauses Acts which deal with fittings and apparatus, and ss. 24 and 25 of the Act also shew that the Legislature has assumed that somewhere or other it has given power to supply the things there mentioned for the purpose of supplying electricity, and the wide definition of "electric line" and "works" in s. 32 of the Act must be read through all the other parts of the Act, and the words "or things of whatever description" in the definition of "works" exclude the rule of ejusdem generis: *Larsen* v. *Sylvester & Co.* (2) Then s. 27 of the Electric Lighting Act, 1909, provides that that Act and the Electric Lighting Acts "shall be construed together as one Act." The effect of that is that every provision of one Act must be read into the other Act: *Canada Southern Ry. Co.* v. *International Bridge Co.* (3) The Act of 1909 grants no further powers in connection with fittings and apparatus, but s. 16 obviously assumes that under the other Acts there is power to let on hire and sell "electric lines, fittings, apparatus and appliances," and of course it applies to provisional orders which do not contain powers to supply fittings. Coming then to s. 10 of the Act of 1882, why should not the undertakers contract to sell fittings, which are certainly incidental to the supply, because they are necessary to enable the consumer to utilize and consume the electricity, and until he begins to consume it the supply is not complete. The expression "necessary and incidental" should be read "necessary *or* incidental," because what is necessary cannot be merely

(1) (1889) 62 L. T. 126. (2) [1908] A. C. 295.
(3) (1883) 8 App. Cas. 723, 727.

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incidental: Maxwell on the Interpretation of the Statutes, 4th ed. p. 357, and cases there cited. It is submitted, therefore, that s. 10 does include a power to contract for the letting on hire or for the sale of fittings and other apparatus for the purpose of electricity being supplied to the consumer: *Morris & Bastert, Ld.* v. *Loughborough Corporation.* (1) Then s. 21 of the Order, that was much relied on by the plaintiff, only deals with compulsory supply and leaves the whole area of voluntary contract untouched. As to what things are included in the word "fittings" it has been held, in the case of gas, that "fittings" include a heating stove: *Gaslight and Coke Co.* v. *Hardy.* (2) Lastly, the defendants have been doing the acts complained of since 1898, and the plaintiff, if he proves his case, is not entitled to an injunction as of right. The Court has a discretion in the matter: *Attorney-General* v. *Wimbledon House Estate Co.* (3); *Attorney-General* v. *Birmingham, Tame, and Rea District Drainage Board.* (4)

Felix Cassel, K.C., in reply.

Cur. adv. vult.

June 20. NEVILLE J. delivered the following written judgment:—The Attorney-General, on the relation of a ratepayer of the borough of Leicester, sues the defendants, the corporation, to restrain certain acts alleged to be ultra vires. The defendants are the undertakers under the Electric Lighting Act, 1882, and a Provisional Order granted thereunder, for the supply of electric energy within the borough. They claim the right to supply the wires and fittings used for the taking and consuming of such energy, including bells and motors worked by such energy, to persons taking energy from them under the Order. They based this claim at the trial solely on the statutory powers vested in them under the Electric Lighting Acts and Order. Their title to do these things, which admittedly have been done, is the main and important issue between the parties. The plaintiff alleges that, in addition to the acts which they claim a right to do, the defendants have in fact supplied fittings to persons in respect of

(1) [1908] 1 K. B. 205, 215.
(2) (1886) 17 Q. B. D. 619.
(3) [1904] 2 Ch. 34, 42.
(4) [1910] 1 Ch. 48, 53.

buildings within the borough who do not take energy from them, and in connection with buildings and to persons resident outside the borough. In the view of the case which I take this is not important, and I can dispose of the matter at once by saying that in my opinion the plaintiff proved his allegations.

To come to the more important question, the extent of the defendants' statutory powers, I think it unnecessary to consider the nature of the fittings and apparatus supplied by the defendants to the consumers. By s. 18 of the Electric Lighting Act, 1882, the consumer has the right to use the electricity supplied for all purposes without interference by the undertakers. If, therefore, the defendants are entitled to supply lamps to the consumers for lighting purposes, it seems to me they must be equally entitled to supply apparatus for the use of the electricity in any other way. The defendants contend that their acts are justified as being part of the supply within the meaning of the Act and Order, or as being reasonably necessary or incidental to such supply. Sect. 10 of the Act of 1882 authorizes undertakers to generally do all such acts and things for the purpose of supplying electricity as may be necessary and incidental to such supply. The Act having expressly given general powers to do all such acts and things as may be necessary and incidental to the particular power to supply, it seems to me difficult to imply any further powers to do what is reasonably incidental to the powers to supply. It may well be, however, that the words may be read as "necessary or incidental to such supply," in which case the general powers expressly given would be identical with the general powers which would have been inferred had the Act been silent with regard to them. This consideration, however, seems to me unimportant, for if the right to supply energy does not itself include the right to wire and fit the premises supplied, I think the right cannot be claimed as incidental. If there be a distinction between supply and use, so far as the undertakers are concerned, the acts done are clearly referable to the use, and not to the supply.

I come therefore to consider whether installation and the supply of lamps and fittings is part of the supply within the meaning of that word in the Act. I pause here to say that, in

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my opinion, the Court is in no way concerned with the consideration of the desirability or undesirability of the powers claimed being vested in the defendants: that is for the Legislature alone. Further, I think it immaterial whether the defendants have made a profit or a loss by the business. If it is ultra vires, it is not the less so because it is commercially unsuccessful, nor could the most brilliant success enlarge the powers of the defendants. An analogy between the Acts relating to gas and electricity has been insisted upon as indicating the intention of the Legislature to bestow upon the undertakers under the latter powers with regard to the supply of electrical fittings and apparatus similar to those bestowed by the former with regard to pipes, burners, meters, and lamps. In fact, however, ss. 13 and 14 of the Gas-works Clauses Act, 1847 (10 & 11 Vict. c. 15), give express power in the case of gas, and there is no corresponding section in the Electric Lighting Act, 1882, while s. 18 of the Act of 1882 expressly negatives the right of the undertakers to prescribe any lamp or interfere with the use of electricity by consumers in contra-distinction to the right to prescribe the burner given to the undertakers by s. 18 of the Act of 1847. I think, therefore, that the analogy fails. I also think that there is nothing in the sections of the Act of 1847 inconsistent with the construction of "supply" in the Act of 1882 contended for by the plaintiff, namely, that it means the supply of energy to the consumer at his terminals. Sect. 18, already referred to, plainly discriminates between supply of electricity and its use, and gives the undertakers no authority with regard to the latter. When we turn to the Provisional Order the interpretation, in my opinion, becomes still plainer; "consumer's terminals" is there stated to mean "the ends of the electric lines situate upon any consumer's premises and belonging to him at which the supply of energy is delivered from the service lines." The undertakers have power to charge for supply of energy and for meters and fittings, but for furnishing and laying lines they have no power to charge except in special cases. By clause 21 of the Provisional Order, however, they are bound to give a supply of energy on demand, and, if the wiring of the house and provision of fittings is part of the supply, they would be compellable to do it without remuneration, and I think

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there is force in the plaintiff's argument that this cannot have been intended by the Legislature. In my opinion "supply" within the meaning of the Act and Order is completed at the consumer's terminals. The installation of electricity and provision of fittings is in my opinion a separate business incidental to the use but not to the supply of energy. I think that the defendants have misinterpreted their powers and have been carrying on a business in excess of them. In my opinion the Electric Lighting Act of 1909 does not throw light upon the meaning of "supply" in the Act of 1882, s. 16 in the Act of 1909 not having, in my opinion, reference to any power given by the Act of 1882. I think the plaintiff is entitled to the declaration and injunction asked for, and that the defendants must pay the costs of the action.

Solicitors: *Turner & Co.; Field, Roscoe & Co., for H. A. Pritchard, Town Clerk of Leicester.*

H. L. F.

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[1909 G. 239.]

Patent—Infringement—Invalidity—Amendment of Specification—Disclaimer—Terms—Damages—Injunction—Member of Public—Patents and Designs Act, 1907 (7 *Edw.* 7, *c.* 29), *ss.* 22, 23, 33—*Rules of the Supreme Court, Order* LIIIA, *r.* 23.

As a general rule the Court will not in the exercise of its discretion in allowing an amendment of a patent under s. 22 of the Patents and Designs Act, 1907, impose a condition, in the absence of special circumstances, preventing the applicant from maintaining any actions whatever in respect to matters prior to the date at which leave to amend is given; but it will in some cases declare that, in addition to the restriction on recovery of damages provided by s. 23, the patentee shall not sue for an injunction in respect of the use of the invention before disclaimer, unless he establishes that his original claim was framed in good faith and with reasonable skill and knowledge.

The plaintiffs in an action for infringement of their patent applied by motion for an order that they might be at liberty to amend their specification by way of disclaimer and that the specification so amended might be used in evidence at the trial of the action upon such terms as the

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Court might think fit. On November 26, 1909, an order was made by consent whereby, the plaintiffs undertaking not to proceed with and (if required) to consent to orders staying (pending the application) all proceedings in all their other pending actions for infringement of their patent, and to abide by the order of the Court as to the terms which the Court might thereafter think fit to impose as to the matters mentioned in Rules of the Supreme Court, Order LIIIA, r. 23 (*b*), including terms as to the costs of the action and all the other pending actions for infringement of the patent, and not in the meantime to threaten actions for infringement, and to give notice of this order to all the defendants in the other pending actions for infringement, the Court ordered that the applicants should be at liberty to proceed with their application for leave to amend, and that the application should be heard on affidavit evidence. The application now came on for hearing :—

Held, that the proposed amendments came within s. 22 of the Patents and Designs Act, 1907, and that they ought to be allowed upon the terms that the applicants should pay the costs of and occasioned by the application to amend, including costs of persons who had served notice of opposition under Rules of the Supreme Court, Order LIIIA, r. 23; that by consent all the other pending actions for infringement brought by the applicants should be discontinued, with the usual orders as to costs; that no relief by way of damages or injunction should be sought by the applicants in respect of any razors made in or imported into England before November 26, 1909, if the judge at the trial should hold that their original claim was not framed in good faith or with reasonable skill and knowledge; and that the applicants should undertake not to claim any relief in respect of any razor purchased by or coming to the hands of any member of the public, as distinct from the trade, prior to November 26, 1909.

ON July 30, 1909, Parker J. made an order dismissing, on the ground of the invalidity of the patent No. 28,763 of 1902 for improvements in safety and other razors, an action of *Gillette Safety Razor Co.* v. *A. W. Gamage, Ld.* (1), which had been brought to restrain infringement thereof. At that time the present action, *Gillette Safety Razor Co.* v. *Luna Safety Razor Co.*, and several other actions brought by the same plaintiffs for a similar purpose were pending, and the plaintiffs applied to Parker J. by motion in the present action for an order that pursuant to s. 22 of the Patents and Designs Act, 1907, they might be at liberty to amend their specification by way of disclaimer, and that the specification so amended might be used in evidence on the hearing of the action upon such terms as to his Lordship might seem fit.

(1) (1909) 26 Rep. Pat. Cas. 745.

On November 26, 1909, an order was made by consent whereby, the plaintiffs undertaking not to proceed with and (if required) to consent to orders staying (pending this application) all proceedings in all other pending actions for infringement of the said letters patent, and to abide by the order of the Court as to the terms which the Court might hereafter think fit to impose as to the matters mentioned in Rules of the Supreme Court, Order LIIIA, r. 23 (*b*), including terms as to the costs of the action and all the other pending actions for infringement, and not in the meantime to threaten actions for infringement of the said patent, and to give notice of this order to all the defendants in the other pending actions for infringement, the Court did order that the applicants should be at liberty to proceed with their application for leave to amend the specification of their patent, and that the application should be heard on affidavit evidence.

The application now came on for hearing.

The proposed amendments are stated in the judgment of Parker J.

Sir A. Cripps, K.C., T. Terrell, K.C., and *R. H. Hodge*, for the applicants. We ask for unconditional leave to amend our specification. The proposed amendments are by way of disclaimer within s. 22 of the Patents and Designs Act, 1907, and do not make the specification claim an invention larger than or different from that claimed by the specification before amendment. We admit that under s. 23 we cannot claim damages in respect of the use of the invention before November 26, 1909, without shewing that our original claim was framed in good faith and with reasonable skill and knowledge. If we are allowed to make these amendments we will agree to discontinue all our other pending actions for infringement and to pay the costs in the usual way. If necessary we can start fresh proceedings. No further conditions beyond the statutory conditions of ss. 22 and 23 ought to be imposed on us unless special circumstances are proved, and that cannot be done. Under the old practice an application of this sort was made in the first place by motion for leave to apply to the Comptroller,

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and on that motion the Court imposed terms, and the Comptroller never imposed any further terms: *In re Allison's Patent.* (1) By the agreement between the parties in this case the present hearing is equivalent to the motion for leave to apply to the Comptroller, and the terms will be imposed now and treated as if they had been settled on November 26, 1909. The proper form of order is that made in *Haslam Foundry and Engineering Co.* v. *Goodfellow.* (2) Unless there are special circumstances the Court will not go beyond that and say that no action whatever will be allowed to be brought for any infringement prior to the date of the order allowing the amendments: *In re Geipel's Patent* (3); *In re Klaber and Steinberg's Patent.* (4) In *Deeley* v. *Perkes* (5) such an order was made, but in that case the patent had been actually revoked and no settled form of order was laid down: *Ludington Cigarette Machine Co.* v. *Baron Cigarette Machine Co.* (6) In *Corrigall* v. *Armstrong, Whitworth & Co.* (7) the patentee had to waive all relief in respect of infringement prior to amendment, but he had known of the infringement for nine years before action brought. Where there are no special circumstances, and there are none here, the only term imposed by the Court is payment of costs. We do not object to members of the public who are not dealers in safety razors being protected.

A. J. Walter, K.C., and *J. W. Gordon*, for the Luna Safety Razor Company. The proposed amendments will entirely alter the character of the patent and they ought not to be allowed. If they are allowed it should only be on the terms that the plaintiffs discontinue all their patent actions and pay the costs of them. Any member of the public who has bought a razor, not only before November 26, 1909, but until the patent is actually amended, should be protected. There are special circumstances in this case, and one of the terms ought to be that the plaintiffs should waive all right to relief in respect of anything done before amendment: *Goulard & Gibbs* v. *Lindsay* (8);

(1) (1900) 17 Rep. Pat. Cas. 513, 515.
(2) (1887) 37 Ch. D. 118.
(3) [1903] 2 Ch. 715, 721; on appeal, [1904] 1 Ch. 239.
(4) [1908] 1 Ch. 847.
(5) [1896] A. C. 496.
(6) (1900) 17 Rep. Pat. Cas. 214.
(7) (1903) 20 Rep. Pat. Cas. 523.
(8) (1888) 5 Rep. Pat. Cas. 192.

In re Allison's Patent (1); *Ludington Cigarette Machine Co.* v. *Baron Cigarette Machine Co.* (2) The plaintiffs began their business knowing that their patent was invalid, and they lay by and let us build up a trade in the belief that it was invalid: those are special circumstances: *In re Scott's Patent.* (3) Retail dealers ought to be protected as well as the public. The plaintiffs could not sue them on an invalid patent, and the Court will not do anything which will give the plaintiffs an additional right.

A. B. Shaw, for the P. D. Q. Razor, Limited. (4) The plaintiffs commenced an action for infringement against us in January, 1909, and ever since then have prevented us from trading. Now they abandon almost the whole of their patent and discontinue their action against us. In these circumstances it would be fair that they should not be allowed to bring a fresh action against us unless we recommence trading.

[PARKER J. I agree. But the Legislature has said in s. 23 that a fresh action may be brought provided the plaintiffs shew that their original claim was framed in good faith and with reasonable skill and knowledge. You thought the patent was bad, but you knew that it might be amended.]

The order should be made in our action.

Sir A. Cripps, K.C., in reply.

PARKER J. This is an application under s. 22 of the Patents and Designs Act, 1907, in a pending action for infringement for liberty to amend the specification, it having been recently declared that as the patent now stands it is invalid.

When the motion originally came before me, as it did under Rules of the Supreme Court, Order LIIIA, r. 28, an arrangement was made between counsel for the various parties, to which I consented, that the terms and conditions on which the application might be allowed to proceed should be discussed when the application actually came on for hearing, and the applicants undertook to abide by such conditions as I might

(1) 17 Rep. Pat. Cas. 513.
(2) 17 Rep. Pat. Cas. 214.
(3) (1902) 20 Rep. Pat. Cas. 257.
(4) See the minutes of Order, *ad fin.*, at p. 382, post.

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then impose. I have therefore two questions now to consider: the first is whether the application to amend should be allowed, and, secondly, if it is allowed, on what terms and conditions.

Now the proposed amendment is by way of disclaimer of a number of paragraphs in the claiming clauses of the specification, and the body of the specification is only intended to be altered in two respects. In the first respect the alteration proposed is this: The initial words of the original specification were "This invention relates to razors and refers more particularly to that sort generally known as safety razors," and the amendment proposed is to limit that clause to safety razors only, and let the passage read "This invention relates to a class of safety razors." From that point in the specification down to the concluding clause no alteration is proposed to be made, because as a matter of fact every word down to the concluding paragraph of the specification relates only to that class of razors known as safety razors, and therefore requires no alteration. There is a clause at the end of the specification which I think on its true construction claims to extend the invention beyond safety razors to razors in general provided certain conditions were fulfilled, and it is proposed to strike that clause out altogether. Then with regard to the claims, claims 2, 3, 5, 6, 9, 11, 12, and 15 are proposed to be struck out altogether, and no objection is made to striking them out. With regard to two other claiming clauses a slight alteration is proposed to be made. In Nos. 8 and 10, which originally commenced "In a razor," it is proposed to insert the word "safety," so that it will run "In a safety razor," the object of that being to make it quite clear that the claim is to be limited to that class of razors which is known as safety razors, and is not to extend beyond that class. It is suggested that this insertion of the word "safety" is not an amendment by way of disclaimer, because it is said that according to the true construction of those clauses as originally drawn they did not extend to safety razors at all, but only extended to razors other than safety razors, so that the insertion of "safety razors" in effect makes the clause claim an invention which was not originally claimed at all. I do not take that view of the construction of the specification. I went thoroughly into its construction in the former case of

Gillette Safety Razor Co. v. *A. W. Gamage, Ld.* (1), and I came to the conclusion that both these claims were confined to safety razors, and nothing that has been said on this occasion has induced me to alter that view. As a matter of fact, even if I were wrong in that, it is perfectly evident that both clauses comprise safety razors though they may not be limited to safety razors, because all the way through in this specification "razor" is used as the genus and "safety razor" as the species, and it appears to me that in claims 8 and 10 "razor" is used generically, unless it is by force of the context, as I think it is myself, confined to the species, namely, safety razors. In my opinion, therefore, nothing in the way of amendment is suggested which can go beyond the clauses of the Act, and I think the amendments all operate by way of disclaimer and ought all to be allowed.

I come now to the question of the conditions which ought to be imposed upon the applicants. It is to be observed that in s. 23 of the Act, which deals with amendments or contemplates the case of amendments having been made under either s. 21 or s. 22, there is a proviso that no damages shall be given in any action in respect of the use of the invention before the disclaimer, correction, or explanation, unless the patentee establishes to the satisfaction of the Court that his original claim was framed in good faith and with reasonable skill and knowledge. That clearly shews that the Legislature did not contemplate that either the Comptroller or the Court should as a general rule impose a condition that no action was to be brought at all in respect of any matter prior to the date of the amendment or the leave to amend; but it imposes a statutory condition that there must have been good faith and reasonable skill and knowledge in the preparation of the original specification as a condition for obtaining relief by way of damages. Therefore it would be wrong if I were to say that the Court ought as a matter of course in the exercise of its discretion in allowing an amendment under s. 22 to impose a condition preventing the applicant from maintaining actions in respect to any matter prior to the date at which leave to amend is given. At the same time there may be,

(1) 26 Rep. Pat. Cas. 745.

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and there have been, many cases where under special circumstances a condition of that sort ought to be or has been imposed. I do not think, inasmuch as every case must in my opinion rest on its own merits, I need go into the nature of such special circumstances. I will only say this, that it appears to me in the present case that there are no such special circumstances as would justify me in imposing conditions precluding all actions being brought in respect of matters which occurred prior to the date when this application first came before me or prior to to-day, when I actually allow the amendment. The conditions which I think ought to be imposed are as follows. In the first place, it seems to me to be reasonably fair and proper that the applicants, who are really asking for an indulgence, should pay the costs of and occasioned by the application, and those costs will include the costs of persons who have served notice of opposition and who are entitled to be heard under Rules of the Supreme Court, Order LIIIA, r. 23. In the second place, with regard to the action in which this motion is made and with regard to every other action for infringement which is now pending, I think the applicants ought to pay the costs which have hitherto been incurred, and they themselves are willing to do that in the following way: none of the other proceedings have reached the stage in which the applicants have lost their right to discontinue, and they offer an undertaking to discontinue them with the usual consequences, namely, that they will pay the costs. Possibly if one of those actions had reached a stage when it could not have been discontinued without the leave of the Court, that might have been a special circumstance which ought to be taken into consideration. On the question whether some condition ought to be imposed to the effect that the applicants should not bring against any of the defendants in those actions another action for the same purpose, I think that, inasmuch as they have a right now to discontinue, no special circumstances arise which would justify me in imposing such a condition. The conditions already imposed relate to costs, but there is another condition which under the circumstances of this case I may also reasonably impose. A good deal of evidence has been filed, some of which is exceedingly contradictory, or, if it is not contradictory

in terms, at any rate suggests problems as to which the evidence is not conclusive, pointing or intended to point to a want of bona fides or a want of reasonable skill and knowledge on the part of the plaintiffs. In my opinion, to meet the possibility of its being established, as it might be, in some action to be hereafter brought, that there had been that want of bona fides or skill and knowledge in the preparation of the original specification, the statutory provision may reasonably be extended so as to include relief by way of injunction as well as relief by way of damages. That condition has been imposed by the Court in several cases, of which I will take *In re Geipel's Patent* (1) as an instance, and I propose, therefore, in the present case to impose it in the words or practically in the words, with such alteration as may be necessary, which were adopted in that case.

Lastly, and as to this I do not think there is any dispute, there will be an undertaking by the applicants by way of disclaimer of all claim to relief for infringement in respect of any articles purchased by or coming into the hands of any members of the public, as opposed to the trade, prior to the date at which the motion was first before me. I suggested that some such undertaking was reasonable, because when people buy articles such as safety razors they are not apt to consider whether they are infringing articles or otherwise, and so far as the public is concerned I think it is a reasonable condition in connection with an indulgence of this sort that the applicants should be put on terms not to bring actions against members of the public who have bought innocently and who may continue to use the goods that they have bought, notwithstanding that they subsequently receive notice that the goods were an infringement of the patent. Sir Alfred Cripps on behalf of his clients accepts that suggestion, and therefore I need not consider whether, if it had been opposed, I should have been able to make it part of the order, but I accept the undertaking and I am glad it has been given.

The minutes of the Order as finally settled provided that—

"The plaintiffs by their counsel undertaking forthwith to give notice of discontinuance in other pending actions for infringement, and also not to

(1) [1903] 2 Ch. 715.

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sue any member of the public, as distinguished from the trade, for infringement in respect of any razor purchased or acquired by him prior to the 26th November, 1909, this Court doth order that the said specification be amended as follows . . . . And it is ordered that no action is to be brought by the plaintiffs for any infringement in respect of any razors made in or imported into England prior to the 26th November, 1909, unless the plaintiffs establish to the satisfaction of the Court that the original claim of the patentee was framed in good faith and with reasonable skill and knowledge And it is ordered that the plaintiffs pay to the defendants the amount of their costs of this action including their costs of the said Order dated the 26th November, 1909, and of this application so much if any of such amount as shall remain unsatisfied after payment out of the funds in Court to the credit of this action and also pay to the P. D. Q. Razor Limited their costs of appearing under Order LIIIA, r. 23, both such costs to be taxed by the taxing Master And it is ordered that the funds in Court be dealt with as directed in the schedule hereto.

"And it is ordered that all further proceedings in this action except for the purpose of giving effect to this Order be stayed."

Solicitors: *Gush, Phillips, Walters & Williams; Kenneth Brown, Baker, Baker & Co.; Whitelock & Storr.*

H. C. R.

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MOSELY *v.* KOFFYFONTEIN MINES, LIMITED.

[1909 M. 2722.]

Company—Memorandum and Articles of Association—Alteration by Special Resolution — Increase of Capital — Resolution of Directors — Validity — Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 12; *Sched I., Table A, arts.* 26, 55, 68.

The articles of association of a limited company incorporated in 1893 provided by article 53 that "the company in general meeting" might increase its capital by the creation of new shares. By a special resolution, passed and confirmed at extraordinary general meetings of the company in 1895, article 53 was modified so that the power of increasing the capital should no longer be exercised by the company in general meeting but by "resolution of the directors." In 1903 the directors passed a resolution increasing the capital of the company. By s. 12 of the Companies Act, 1862, it was provided that "any company" limited by shares might so far modify the conditions of its memorandum as to increase its capital by the issue of new shares. In an action by a shareholder seeking to have the resolutions declared ultra vires:—

Held that, reading the Act of 1862 and the schedule together, the Legislature conferred upon the company powers which it was not

necessary that the company should exercise in general meeting, and s. 12 of the Act of 1862 contained one of such powers.

Held, also, that the provision of further capital for the carrying on of a trading concern was a power exercisable in the management of the company's business within the meaning of art. 55 of Table A in the schedule to the Act of 1862.

Held, therefore, that the company was acting within its powers in modifying its articles so as to give the board of directors power to increase the capital, and the action must be dismissed.

Campbell's Case, (1873) L. R. 9 Ch. 1, 22, followed.

WITNESS ACTION.

The defendant company, the Koffyfontein Mines, Limited, was incorporated on May 19, 1893, under the Companies Acts, 1862 to 1890, as a company limited by shares. The objects for which the company was established were to acquire and work certain concessions, lands, mining and other rights in South Africa and elsewhere, and, in particular, the Koffyfontein Mine in the Orange Free State (now Orange River Colony). The four other defendants were the present directors of the company.

The capital of the company, as stated in its memorandum of association, was 125,200*l.* divided into 125,000 ordinary shares of 1*l.* each, and two of 100*l.* each, known as life governors' shares. The plaintiff Alfred Mosely, who sued on behalf of himself and of all other shareholders of the defendant company (except the defendant shareholders), was a large shareholder in the company. He was also one of the original directors under the articles and one of the two life governors, and entitled, so long as he held that office, to hold office as a director under the clause in the articles appointing him an original director, and whilst so doing to be called a permanent director. Under the memorandum of association a life governor had a right to vote at meetings of the directors until he vacated his office of permanent director.

Article 53 of the articles of association of the company, as originally framed, provided as follows:—

"The company in general meeting may, from time to time, whether all the shares for the time being created shall have been issued or not, or all the shares for the time being issued shall have been fully called up or not, increase its capital by the

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creation of new shares, such aggregate increase to be of such amount, and to be divided into shares of such respective amounts as the company by the resolution creating such new shares directs. Provided that, save for the acquisition of new property, there shall be no increase of capital beyond an increase up to a nominal capital of 250,000*l.*, without the sanction of an extraordinary resolution."

Pursuant to a special resolution of the company in general meeting, duly passed and confirmed on November 27, 1894, the capital of the company was increased by the issue of 50,000 shares of 1*l.* each.

At extraordinary general meetings of the company held on May 9, 1895, and May 27, 1895, the company purported to pass and confirm certain special resolutions, one being that the articles of association of the company be altered in the following manner:—"That in article 53 the words 'by resolution of the directors' be substituted for the words 'in general meeting' in the first line, and that the words 'the permanent directors or director whilst they or he shall hold office' be substituted for the words 'an extraordinary resolution' in the last line of the said article."

The plaintiff seconded this resolution. By a resolution of the board of directors passed on September 28, 1896, they purported to increase the capital of the company by the creation of 75,000 new ordinary shares of 1*l.* each. The plaintiff was a consenting party, as a director and life governor, to this resolution, and a batch of 4930 shares of this issue was allotted to him. It was not sought to impugn the validity of this issue.

On August 23, 1897, the plaintiff gave notice by letter tendering his resignation of his seat upon the board.

On December 4, 1903, the directors of the company passed a further resolution "that the capital of the company be increased to 375,000*l.* by the creation of 125,000 new ordinary shares of 1*l.* each." The plaintiff had not assented to this resolution, and claimed to be still a permanent director.

On November 4, 1909, he brought his action, and claimed (1.) a declaration that the special resolution purporting to have been

passed and confirmed on May 9 and May 27, 1895, and the resolution passed by the directors on December 4, 1903, purporting to effect an increase of capital, were ultra vires; (2.) a declaration that the attempted issue of new shares pursuant to the resolutions was ultra vires; (3.) a declaration that the directors had no power to issue any new shares in the defendant company; and (4.) an injunction to restrain the defendants from issuing or dealing with any new shares.

The main question raised was whether, having regard to the terms of s. 12 of the Companies Act, 1862, the directors alone were entitled by resolution to increase the capital of the company under the power delegated to them by the company.

A subsidiary question was also raised whether, having regard to the fact that the plaintiff as a permanent director had not sanctioned the increase of capital by assenting to the resolution of 1903, that resolution could be acted upon, but this point does not call for detailed notice, as the judge held that the plaintiff had in fact vacated his office of permanent director in 1897, in accordance with the provisions of the articles.

Buckmaster, *K.C.*, and *H. Greenwood*, for the plaintiff. Both the Companies Act of 1862 and the Companies (Consolidation) Act, 1908, permit the alteration of a memorandum of association by increasing the capital, but that alteration, it is submitted, can only be made by the company in general meeting, and not by the directors alone. The directors have power to manage the business of the company, but not to alter its constitution. Table A can be looked at to see what is the real intention and meaning of the statute. (1)

(1) Sect. 12 of the Companies Act, 1862: "Any company limited by shares may so far modify the conditions contained in its memorandum of association, if authorized to do so by its regulations as originally framed, or as altered by special resolution in manner hereinafter mentioned, as to increase its capital, by the issue of new shares of such amount as it thinks expedient, or to consolidate and divide its capital into shares of larger amount than its existing shares, or to convert its paid-up shares into stock, but, save as aforesaid, and save as is hereinafter provided in the case of a change of name, no alteration shall be made by any company in the conditions contained in its memorandum of association."

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Arts. 26, 55, and 68 of Table A in the schedule to the Act are in point. (1)

The cases as to the bearing of Table A upon such a question as this are *In re Barned's Banking Co.* (2) and *In re Pyle Works.* (3)

We submit that this power to create new shares is not one which can be delegated to the directors, who, in turn, may delegate it to one person who would thus control the issue of the shares. It is to be done by "the company," and the company acts in general meeting. If the company had determined in general meeting that there should be an increase of capital, it may be conceded that the directors could decide on the amount of such increase, and the time and manner of it.

[EVE J. referred to art. 55 of Table A.]

Under that article the directors may carry on the business and exercise the powers of the company for carrying on the business, but the issuing of new shares is not the carrying on of the business of the company, but an alteration of the memorandum, which is the very foundation of the company itself. That is outside the competence of the directors.

(1) Art. 26: "The directors may, with the sanction of a special resolution of the company previously given in general meeting, increase its capital by the issue of new shares, such aggregate increase to be of such amount, and to be divided into shares of such respective amounts, as the company in general meeting directs, or, if no direction is given, as the directors think expedient."

Art. 55: "The business of the company shall be managed by the directors, who may pay all expenses incurred in getting up and registering the company, and may exercise all such powers of the company as are not by the foregoing Act, or by these articles, required to be exercised by the company in general meeting, subject nevertheless to any regulations of these articles, to the provisions of the foregoing Act, and to such regulations, being not inconsistent with the aforesaid regulations or provisions, as may be prescribed by the company in general meeting; but no regulation made by the company in general meeting shall invalidate any prior act of the directors which would have been valid if such regulation had not been made."

Art. 68; "The directors may delegate any of their powers to committees consisting of such member or members of their body as they think fit: any committee so formed shall, in the exercise of the powers so delegated, conform to any regulations that may be imposed on them by the directors."

(2) (1867) L. R. 3 Ch. 105.

(3) (1890) 44 Ch. D. 534.

Upjohn, K.C., Jessel, K.C., and *J. W. M. Holmes*, for the defendants. Upon the main point raised the question is covered by *Campbell's Case* (1); that is conclusive against the plaintiff: Palmer's Company Precedents, 10th ed. Pt. I. p. 619. The question is what is the true construction of the Act of 1862?

If Table A is looked at, arts. 26 and 55 are in favour of the contention that when limitations to the powers of the company are intended they are specially mentioned. Under s. 12 "the company" may do certain things, but the mode is not specified as it is in many other sections of the Act. If the power of delegating is abused the Court would deal with it. In the course of managing the business of the company questions of the increase of capital are sure to arise. It cannot be said to be remote from the conduct of the business. The case of *Towers* v. *African Tug Co.* (2) shews that a shareholder who has known all the facts, and received dividends with knowledge of the facts, cannot bring such an action as this; he is precluded by his own conduct.

Further, there is no power in the general body of shareholders to override the decision of the board of directors in a matter which can lawfully be entrusted to the board: *Salmon* v. *Quin & Axtens, Ld.* (3) The action is misconceived, and the Court will be unwilling to upset a resolution passed fifteen years ago and acted upon with the consent of the plaintiff himself.

H. Greenwood in reply.

EVE J., after stating the claim and the facts, continued:— The claim for relief depends upon the question whether, in the case of a company duly authorized by its regulations to increase its capital, it is within the competency of the company to vest in the board of directors the power of making an increase, or whether the power must be exercised by the corporation in general meeting.

Dealing first with the Act of 1862, apart from Table A contained in the schedule to it, is there anything in the Act which prohibits the company from entrusting to the board or any other duly constituted agents the right to exercise the power conferred upon the

(1) L. R. 9 Ch. 1. (2) [1904] 1 Ch. 558.
(3) [1909] 1 Ch. 311, 319.

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company by s. 12 of the Act? An examination of the Act such as we have made to-day shews that the Legislature contemplated that certain powers thereby conferred upon companies should only be exercised subject to certain limitations and conditions. In some cases the power was only to be exercised by the company in general meeting by an ordinary resolution; in other cases the power could be exercised by the company at an ordinary meeting by an extraordinary resolution; and in a third class of case the power could be exercised by the company in general meeting, but only by the passing and confirming of a special resolution under ss. 50 and 51 of the Act; finally there is another class of cases in which the power exercisable by the company is subject to confirmation by a Government department, or by the Court. It is material to bear these matters in mind because they indicate that the Legislature was fully aware of the fact that there were divers ways in which a company might exercise its powers, and when one finds in s. 12 no particular manner indicated in which the power must be exercised, one is almost driven to the conclusion that the Legislature did not think fit to impose any condition as to the manner in which the company should exercise the power. So much for the statute apart from the schedule. Turning to the schedule, and in particular to art. 55 therein, the impression which the reading of the statute alone has produced is confirmed by this, that the wording of that article shews that the draftsman had in mind that there were contained in the statute and thereby conferred upon the company powers which the company was not required to exercise in general meeting. The net result of reading, as I agree with Mr. Buckmaster and Mr. Greenwood I ought to do, the Act and the schedule together is this, that one sees that the Legislature clearly realized that, in addition to the powers to be exercised in the manner and subject to the limitations which I have already mentioned, they were conferring upon the company powers which it is not necessary that the company should exercise in general meeting. Looking through the Act to ascertain what those powers are, I think one is driven to the conclusion that they are those powers which, in the Act itself, are not qualified by any of the conditions or limitations to which I have referred. Upon that I should be prepared to hold

that s. 12 contains one of those powers upon the exercise of which there is no such qualification; but it is said that so to do is to disregard the importance of the power dealt with in s. 12, and to sanction a state of things whereby an alteration of the capital transforming a company registered with a very modest capital into a company with a very enormous capital may be brought about by the will of the board of directors or even by the will of a single individual to whom the directors have delegated their power. There is much in Mr. Upjohn's criticism of an argument pressed to an extreme like that, but apart from that consideration I do not think I am justified in a matter of construction in being influenced by the results which may flow from the construction, if I once come to the conclusion that the words bear the particular meaning. If the Legislature, alive to the consequences of this construction, desires to avert such consequences it is for the Legislature so to amend the statute as to modify or restrict in future the power or the exercise of the power now conferred. I cannot, therefore, even if I thought the matter was of the great moment which counsel for the plaintiff have invited me to think it is, let that influence the clear opinion at which I have arrived on the question of construction. But I do not really think it is of so much importance as is suggested. After all it is one thing to pass a resolution for increasing capital, and another thing to get persons to find the capital. We have in this particular case a remarkable instance of that. The directors came to the conclusion in 1896 that it was essential for the business of the company that a further sum of 75,000*l.* should be immediately subscribed. They appealed to the shareholders to put them in possession of the further 75,000*l.*, and the shareholders evidenced their opinion of the necessity for the money by subscribing 349*l.* Although it may be that the directors propose an increase of capital, it is, after all, the public, or the shareholders, who dispose of the matter.

I think that art. 26 of Table A, upon which the plaintiff's counsel have also relied, goes to confirm the view at which I have arrived. A company registered under the Act of 1862 without articles of association, and a company, therefore, to

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which Table A would be applicable, must, it is true, sanction an increase of capital, but thereafter it is competent for the directors, and the directors alone, to determine by how much the capital shall be increased and the manner in which the increase shall be brought about. It is argued that this is really all that the plaintiff contends for here; he is content, if the company determine in general meeting the question, Aye or No, should there be an increase, to concede that it may be left to the directors to decide the amount of the increase, and the time and manner in which it may be made. But these latter details are matters of substance involving the very point which has been pressed upon me in another part of the argument, the amount of the increase, and the fact that these details in the case of a company regulated by the statutory code are left to the directors goes far in my opinion to shew that the Legislature did not intend to limit the exercise of this power of increasing capital to the company in general meeting. This, of course, brings one back to the question of construction. In a company regulated by Table A the directors could not, until they had obtained the sanction of a special resolution, do anything in the way of giving effect to a contemplated increase of capital, but art. 26 only indicates a method by which the company may control the action of the directors, and it does not, in my opinion, so control the construction of s. 12 of the Act as to impose on every company a limitation on its power of increasing capital corresponding to the limitation provided for companies which elect to adopt the scheduled code.

One further observation I have to make, an observation which takes me back to art. 55, and it is this, that in my opinion the powers which are conferred upon the directors by art. 55 of Table A are cumulative; that is to say, they have power to manage and to do all that is incident to the management of the company's business, and further they have power to exercise and give effect to all those powers conferred upon the company which are not required, either by the Act or by the articles, to be exercised by the company in general meeting. But even assuming that I am wrong in this construction, I still think that the question of the provision of further capital for the carrying on

of a trading concern is eminently a matter connected with, and a power exercisable in the management of, the company's business.

I have dealt so far with the matter as though it were still an open question to be determined upon a close examination of the statute in force at the time when this resolution was passed, but I think the point is really concluded by the decision of the Court of Appeal in *Campbell's Case*. (1) I agree with Mr. Greenwood, as indeed Mr. Upjohn would, that so far as *Campbell's Case* (1) was concerned this point did not become material for decision, that is to say that in that case the company had in fact authorized the increase of the capital, and it became, therefore, immaterial to determine whether or not, as between the company in general meeting on the one hand and the board of directors on the other, the power was vested in the one or the other, but in the course of the hearing of a cause arising on the same facts (2) the Lord Chief Baron had given expression to an opinion which, when the case came to the Court of Appeal, the Lord Chancellor perceived might have a very far-reaching effect, and which, as it did not commend itself to his view of the law, he thought it his duty to correct, and, in correcting it, Lord Selborne used, as perhaps I may be allowed with great respect to say he always did, language chosen with extreme care. In his judgment on this point it will be seen that he adopts throughout a word which is used in s. 12, and I think he adopts it for the purpose of removing any possible doubt as to the point with which he was dealing. In s. 12 of the Act of 1862 the word "authorized" will be found; and throughout the passage, which I do not propose to read again, it will be found that the Lord Chancellor has adhered to the word "authority" for the purpose, as I think, of making it quite clear that the power to which he is referring is the power which clothes the company with authority to make the increase. That he says must be acquired and must be acquired by a special resolution duly passed and confirmed. When once that authority is acquired he then goes on to say that the exercise of the power which the company is thereby authorized to exercise can be left under the section in the hands of the directors.

(1) L. R. 9 Ch. 1, 22.
(2) L. R. 6 C. P. 222. [It was in fact the unanimous judgment of the Exchequer Chamber.]

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In my opinion he does not in his judgment intend to say and certainly does not say that the increase must first be sanctioned by the company, and then that the actual time and mode in which the shares, the subject-matter of the increase, are to be dealt with may be left to the board, but he means and has said that the acquisition of the authority must be by the company, and that, when once that authority has been acquired, it confers a power exercisable by the directors. I think, therefore, that the matter is really concluded by *Campbell's Case* (1), and that the company were acting intra vires in so modifying the article in 1895 as to confer upon the board of directors power to increase the capital in lieu of leaving such power to be exercised only by the company in general meeting. That disposes of the principal point and the main question which has been argued in the case. [His Lordship then dealt with the subsidiary question and held that Mr. Mosely had undoubtedly resigned his office of director and had no continuing right of control over the exercise by the directors of the power validly vested in them.]

I will only add this further, that if I had entertained any doubt as to the validity of the resolution of 1895 I should have hesitated before giving this plaintiff relief in this action. The resolution in question was passed in 1895—over fifteen years ago. It was passed at the invitation of the plaintiff. He, as a director, acted upon it and as one of the underwriters was an allottee of shares issued pursuant to the resolution. From 1896 onwards he has done nothing to repudiate the attitude which he then adopted, and I think it would want a very strong case to induce the Court to interfere with the constitution of a company brought about by a resolution passed so long ago at the instance of a plaintiff who remained a member of the company during the whole of the intervening period, acting upon and availing himself of such advantages as may have accrued from the passing of the resolution, and who now comes, sixteen years afterwards, and asks that the resolution may be declared to be invalid. I do not to-day decide that such a plaintiff would not be entitled to relief. I desire to leave that point open, but I think in this case it would

(1) L. R. 9 Ch. 1, 22.

have been a point which the plaintiff would have had much difficulty in overcoming, had it been necessary to determine the result of the action upon that. I dismiss the action with costs.

Solicitors: *Cohen & Cohen; Ingle, Holmes, Sons & Pott.*

G. M.

STEEDEN *v.* WALDEN.

[1909 S. 2464.]

Infant—Next Friend—Unsuccessful Action—Costs and Damages—Indemnity —Declaration.

Where an action, properly instituted under the advice of counsel, and conducted with diligence and propriety by a next friend in the interest of an infant, has been dismissed with costs and damages to be paid by the next friend, the infant will be held bound to indemnify the next friend against such costs and damages, and the costs, charges, and expenses properly incurred by him on the infant's behalf in relation to such action; but no declaration of charge in respect of such costs will be made upon the infant's property where such property is not being administered by the Court.

ACTION.

The plaintiff in the present action was Edwin George Steeden, and the defendant, William Spring Walden, was an infant. On June 4, 1908, the defendant, by the present plaintiff as his next friend, had commenced an action entitled *Walden* v. *Edmonton Freehold Land and Building Society, Ld. and Mercer* [1908 W. 1752], claiming, amongst other things, a declaration that the infant was entitled to the fee simple in possession of a freehold farm called The Elms at Basildon, in Essex, and an injunction to restrain the society as mortgagees from selling the same, and other relief.

This last-mentioned action was instituted under the advice of counsel, and was alleged by the present plaintiff to have been for the benefit of the infant, and to recover possession of his property. On June 15, 1908, an interim injunction was granted restraining the defendant society from selling, on an undertaking as to

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damages. On February 18, 1909, Eve J. dismissed the action, with costs to be paid by the present plaintiff as next friend, and an inquiry was directed as to damages sustained by the defendants by reason of the interim injunction. The defendants' costs and the damages found by the inquiry amounted in the whole to 468*l.* 13*s.* 10*d.*, and the plaintiff's own costs of action amounted to 248*l.* 16*s.* The present defendant was entitled under the will of one Alice Meen, dated November 30, 1901, to certain freehold lands and hereditaments in West Hampstead, in the county of London (subject to two mortgages), and also to certain chattels and other personal property at Basildon, in the county of Essex.

The defendant having declined to make any provision for the payment of the costs of the action instituted on his behalf, the plaintiff brought this present action on July 28, 1909, claiming a declaration that he was entitled to a charge or lien upon the estate and interest of the defendant in the lands and hereditaments at West Hampstead and the chattels and other personal property at Basildon for the costs, damages, and other moneys payable by the plaintiff as next friend in the action of *Walden* v. *Edmonton Freehold Land and Building Society, Ld. and Mercer*, and the plaintiff claimed a sale or mortgage of the estate and interest of the defendant to enforce the said charge or lien; indemnity; and costs of the action.

The defence was that the action of *Walden* v. *Edmonton Freehold Land and Building Society, Ld. and Mercer* was not a proper action, and was not instituted for the benefit of the defendant, and that the plaintiff did not use reasonable care or diligence in ascertaining the material facts prior to instituting the action.

Jessel, K.C., and *Edward Ford*, for the plaintiff. We ask for a charge upon the infant's property in respect of all the costs incurred by the next friend: *Pritchard* v. *Roberts.* (1) In that case a solicitor was held entitled to a lien on the fund recovered, for the costs of proceedings taken on behalf of an infant.

C. H. Carden Noad, for the defendant. No action ought to

(1) (1873) L. R. 17 Eq. 222.

have been brought at all on the facts. Where an action of this kind has been brought without due consideration the next friend has to pay the costs: *Flight* v. *Bolland.* (1) In the cases cited in Simpson on Infants, 3rd ed. p. 391, where costs have been allowed to a next friend out of the infant's estate, that estate was being administered by the Court.

In the present case the costs and damages incurred are not "necessaries" for the infant. The principle on which the Court proceeds in the case of actions instituted by the next friends of infants is laid down in *In re Fish* (2), namely, that next friends ought not to be allowed to institute actions which fail except at their own risk and not at the risk of the infants. That was followed in *In re Hicks* (3), where the costs of a useless litigation which had been unnecessarily provoked were directed to be paid by a next friend. The costs and damages in the present case ought not to come out of the infant's property, and in any case no declaration of charge can be made where the Court is not administering the estate of the infant: *In re Jones.* (4)

Jessel, K.C., in reply. The next friend is entitled to the costs of an action which has been properly brought and to be indemnified against any costs and damages which he has been ordered to pay. There is clear jurisdiction to order payment out of the infant's estate; that has been established by a long series of cases. The only exceptions to that rule are when actions have been brought by a next friend unnecessarily, without due consideration of the facts, or from an improper motive: *Taner* v. *Ivie* (5); *Whittaker* v. *Marlar* (6); *Pearce* v. *Pearce* (7); *Campbell* v. *Campbell* (8); *Cross* v. *Cross* (9); *Smallwood* v. *Rutter* (10); *Dunn* v. *Dunn* (11); *Clayton* v. *Clarke.* (12)

The action was necessary to protect the interest of the infant, although it turned out unsuccessful owing to the Court being unable to rely upon the evidence of the infant's father. The general principle laid down by the Court holds good whether the

(1) (1828) 4 Russ. 298.
(2) [1893] 2 Ch. 413, 422.
(3) [1893] W. N. 138.
(4) (1883) 48 L. T. 188.
(5) (1752) 2 Ves. Sen. 465.
(6) (1786) 1 Cox, 285.
(7) (1804) 9 Ves. 548.
(8) (1837) 2 My. & Cr. 25.
(9) (1845) 8 Beav. 455.
(10) (1851) 9 Hare, 24.
(11) (1854) 3 Drew. 17.
(12) (1861) 7 Jur. (N.S.) 562.

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estate of the infant is being administered or not: Simpson on Infants, 3rd ed. p. 391.

C. H. C. Noad, in reply upon the cases cited.

Cur. adv. vult.

July 4. EVE J. This action is of an unusual, if not of an unprecedented, character. The plaintiff recently acted as next friend of the defendant in an unsuccessful action, and he now sues the defendant—who is still an infant—claiming a declaration that the defendant is bound to indemnify him against the costs which he incurred, and the costs and damages which he has been ordered to pay in the unsuccessful action. He further claims (1.) a declaration that he is entitled to have the amount of such costs and damages charged upon an equity of redemption and certain chattels and other personal property belonging to the infant; (2.) to have the charge enforced by foreclosure or sale; and (3.) the costs of the action.

The unsuccessful action was an action wherein the present defendant sought to establish his title to a freehold farm, messuage, and premises known as The Elms, Basildon, in the county of Essex, as against a building society claiming to be legal mortgagees from the defendant's father, and the father's trustee in bankruptcy. In the action an interim order was made restraining the building society from exercising their power of sale until judgment or further order upon the usual undertaking as to damages being given.

The action was brought and the interim order applied for under the advice of counsel. The case laid before counsel and his opinion thereon have been put in evidence at this trial, and I am satisfied that all the facts known to the defendant's advisers were fully and accurately placed before counsel, and further that the action was conducted throughout in a proper and reasonable manner.

It was tried by me in February, 1909, and on February 18 I gave judgment dismissing the action, directing an inquiry whether the defendants had suffered any and what damages by reason of the interim order, which the plaintiff ought to pay, and ordering

that the next friend should, within one month from the date of certificate, pay to the defendants any damages thereby certified, and should also pay to the defendants their taxed costs of the action down to and including judgment.

The damages and costs payable to the defendants under that judgment, and an order of July 29, 1909, dealing with the costs subsequent to judgment, amount altogether to 468*l.* 13*s.* 10*d.* The plaintiff's own costs of the action amount to 248*l.* 16*s.*; and it is the total of these two sums—717*l.* 9*s.* 10*d.* in all—for which he claims indemnity in this action.

The general attitude of the Court towards the next friends of infants is stated by Lord Brougham in *Nalder* v. *Hawkins* (1) in the following terms:—"It is undeniable that the habit of the Court has been to encourage persons to come forward as next friends, for the purpose of obtaining its aid on behalf of parties incapacitated to sue for themselves. The language of the books is frequently, that next friends should not be discouraged; but there are cases which go much further, both in their language and in their tendency; cases which, both by the words used, and the things done, give great encouragement to undertake the office. In *Whittaker* v. *Marlar* (2) Lord Thurlow says, that 'Whoever will stand forward in that character, is to be encouraged to every possible extent, while he can be supposed to intend the infant's benefit.' This seems to go as far as possible; it is as much as to say, that any one may do what he pleases as next friend, until he does something which cannot by any possibility be supposed to be done bona fide for the infant's advantage. It must however be observed, that this is rather the language of the case than the point decided; for there the Court, on a full review of the circumstances, dismissed the bill, and made the next friend pay the whole costs of that proceeding and of the application. But it had been referred to the Master to inquire whether or not the suit was necessary, and he had reported against it; and the book does not state the facts upon which the report and the decision are grounded."

Then he proceeds (3): "The true and the just principle

(1) (1833) 2 My. & K. 243, 247. (2) 1 Cox, 285.
(3) 2 My. & K. 249.

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which should govern all such cases is this. No discouragement ought to be thrown in the way of persons bona fide suing as next friends; but no undue facility should be given to mere volunteers, who interfere rather for their own purposes than for the infant's advantage. While they appear to act bona fide they will be protected; the presumption will rather be in their favour; the proof will rather be thrown upon those who impeach their motives; the leaning will be more for than against them. But no strained presumptions will be made to protect them; no forced constructions will be put on their conduct; no benefit from bare possibilities will be conjured up in their behalf. They must be content to have their motives appreciated and their acts judged like other parties. If they have involved themselves in suspicion, their proceedings must be subjected to inquiry; if they have incurred just blame, be it by improper interference, or be it by unnecessary interference, they must abide the consequences; the suit at their instance must be stayed; or if the suit be useful to the infant, but the parties instituting it be unfit to conduct it, they must give place to others in whom the Court can better repose confidence." And language much to the same effect is to be found in the judgment of Turner V.-C. in *Smallwood* v. *Rutter*. (1)

The principles upon which the Court acts in determining whether costs incurred by a next friend may properly be provided for out of property of the infant in course of administration by the Court are illustrated by such cases as (i.) *Taner* v. *Ivie* (2), where Lord Hardwicke L.C. commences his judgment (3) by saying, "This is a very uncommon question to come before the Court, how far a prochein amy in a suit for an infant, which is carried on by approbation of the Court, shall be charged with costs in the event of that suit, or have an allowance for those costs against the infant. To be sure the Court ought to take care of infants, that they are not prejudiced by persons debtors to their estates, or who have the management of their estates: but was the Court to go by such strict rules as are now laid down for the plaintiff who opposes this petition, it would be very dangerous to attempt

(1) 9 Hare, 24. (2) 2 Ves. Sen. 466.
(3) 2 Ves. Sen. 467, 468.

the management of infants' estates. They must act under great degrees of uncertainty and under probabilities; and so must the Masters, who cannot upon such references to them hear the other side against whom the bill is brought, but only judge on circumstances prima facie whether it is reasonable to carry on such a suit for the infant. Application to refer to a Master is very common; a prochein amy will venture to bring a bill to see on what foot the answer put it; but after answer comes in, and that it will probably be attended with expense, then is that application made."

Later on, after dealing with the facts of the case, and the liability as between the next friend and the other party to the litigation, he adds: "It is a different question between the prochein amy and the infant, in whose behalf he has brought the suit; for then the question is whether he was sufficiently warranted to bring it; whether it was brought and carried on in a reasonable manner and without laches; for if so, the infant ought to re-imburse him in that suit, especially in a case of this kind where everything as to the account and management of the infant's estate was under the direction of the Court."

(ii.) *Campbell* v. *Campbell* (1), where Lord Cottenham observes: "It is certainly not usual to make trustees for infants or their next friend pay personally the costs of proceedings; but it would not be a useful exercise of the discretion of the Court to abstain from making an exception, when a course of unnecessary litigation appears to have been adopted."

(iii.) *Cross* v. *Cross* (2), where, in a doubtful case, the Master of the Rolls, "fearful of discouraging interference on behalf of infants very often absolutely necessary for their protection," gave the next friend the benefit of the doubt; (iv.) *Clayton* v. *Clarke* (3); and (v.) *Pritchard* v. *Roberts*. (4) These and other decisions, whereby property of the infant under the control of the Court has been made available to recoup the next friend, proceed upon the footing that the infant is prima facie liable to indemnify the next friend against costs properly incurred on his behalf, and they shew that such liability ought to, and will, be enforced in all

(1) 2 My. & Cr. 25, 30.
(2) 8 Beav. 455.
(3) 7 Jur. (N.S.) 562.
(4) L. R. 17 Eq. 222.

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cases where the Court is satisfied that the litigation has been prompted by motives of benevolence towards the infant, and has been conducted in his interest and with diligence and propriety.

Moreover, in *Helps* v. *Clayton* (1), in a considered judgment to which Willes, Byles, and Keating JJ. were parties, it was held that a plea of infancy was no defence to an action brought to recover the costs of a marriage settlement prepared on the instructions of an infant, given by her father as her agent, on the ground that the preparation of the settlement, which was beneficial as securing to the infant a proper provision, might justly be considered a necessary suitable to her estate and condition.

Nor must it be overlooked that an infant attaining full age pendente lite and abandoning the suit must pay the costs of the next friend, unless he can establish that the action was improperly instituted: *Anon.* (2)

In the present case, as I have already stated, proceedings were commenced under the advice of counsel properly instructed, and although they proved unsuccessful and the infant has derived no benefit thereby, the ultimate event, depending mainly as it did on the extent to which the title of the defendant mortgagees was affected by the fraudulent conduct of the infant's father, remained a matter of uncertainty until all the evidence had been produced at the trial.

Had I been administering the estate of the infant, and had an application been made to me to sanction the institution of the action and its prosecution to a hearing, I should have acceded to the application, and might even have gone so far as to authorize the raising of money to provide for the costs on the security of the infant's property outside the subject of the action.

I think, therefore, this is eminently a case to which I ought to apply the principles underlying the decisions I have referred to, and I propose to make an order declaring that the defendant is bound to indemnify the plaintiff against the costs and damages which he was ordered to pay by the judgment of February 18, 1909, and the order of July 29, 1909, made in the action of *Walden* v. *Edmonton Freehold Land and Building Society and Mercer*, and the costs, charges, and expenses properly

(1) (1864) 17 C. B. (N.S.) 553, 570. (2) (1819) 4 Madd. 461.

incurred by the plaintiff on the defendant's behalf in and in relation to such action. As I am not administering the infant's estate, I do not see my way to make any such declaration of charge as the plaintiff asks for, but I give liberty to apply, and I order the defendant to pay the costs of this action.

Solicitors: *Stoneham & Sons; G. R. Cawley.*

G. M.

ATTORNEY-GENERAL *v.* CHURCHILL'S VETERINARY SANATORIUM, LIMITED.

[1909 A. 963.]

Veterinary Surgeon — "Veterinary Sanatorium" — One Man Company — Unqualified Person Managing Director—Managing Director described as "Specialist"—Misrepresentation—Injunction—Veterinary Surgeons Act, 1881 (44 *&* 45 *Vict. c.* 62), *s.* 17.

Although a limited company is not a "person" within the meaning of s. 17 of the Veterinary Surgeons Act, 1881, and cannot be prosecuted for an offence under that section, an action will lie at the suit of the Attorney-General to restrain the company and its officials from falsely holding out or representing to the public that the individuals who comprise it or are employed by it are veterinary surgeons or persons specially qualified to practise veterinary surgery or any branch thereof.

Attorney-General v. *Myddletons, Ld.*, [1907] 1 I. R. 471, approved and followed.

ACTION.

This was an action at the relation of the Royal College of Veterinary Surgeons to restrain the above-named company and James Churchill, its managing director, from holding out the company as qualified or as being conducted by persons who were qualified to practise the art of veterinary surgery in these circumstances.

The college was incorporated by Royal Charter in 1844 with the object of forming "a school of veterinary art in which the anatomical structure of horses, cattle, sheep, dogs, and other domesticated animals, the diseases to which they are subject, and the remedies proper to be applied, are investigated"; and it was thereby declared that the veterinary art as practised by the

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members of the corporation should thenceforth be deemed and taken to be and recognized as a profession, and that the members of the corporation should "solely and exclusively of all other persons whomsoever be deemed and taken and recognized to be members of the said profession or professors of the said art, and shall be individually known and distinguished by the name or title of veterinary surgeons."

The Veterinary Surgeons Act, 1881, after reciting "it is expedient that provision be made to enable persons requiring the aid of a veterinary surgeon for the cure or prevention of diseases in or injuries to horses or other animals to distinguish between qualified and unqualified practitioners," and after defining (s. 2) "veterinary surgery" to mean "the art and science of veterinary surgery and medicine," provides (ss. 3 to 12) for the manner in which the register of veterinary surgeons is to be kept; s. 13 provides for the registration of colonial or foreign practitioners with recognized diplomas; s. 14 confirms the charters of the college; and

Sect. 17: "(1.) If after the 31st of December, 1883, any person, other than a person who for the time being is on the register of veterinary surgeons, or who at the time of the passing of this Act held the veterinary certificate of the Highland and Agricultural Society of Scotland, takes or uses the title of veterinary surgeon or veterinary practitioner, or any name, title, addition, or description, stating that he is a veterinary surgeon or a practitioner of veterinary surgery or any branch thereof, or is specially qualified to practise the same, he shall be liable to a fine not exceeding 20*l.*

"(2.) From and after the same day a person other than is in this section mentioned shall not be entitled to recover in any court any fee or charge for performing any veterinary operation, or for giving any veterinary attendance or advice, or for acting in any manner as a veterinary surgeon or veterinary practitioner, or for practising in any case veterinary surgery, or any branch thereof."

The defendant James Churchill was not on the register of the college. In July, 1905, he was, on the prosecution of the college, convicted and fined under s. 17 of the Act for holding

himself out as qualified to practise veterinary surgery by the description of "canine and feline surgeon and specialist." In 1908 he was carrying on business at 13, King Street, Richmond, and calling himself "canine specialist," and, on the college threatening proceedings against him, he gave an undertaking to discontinue the use of that expression. On February 3, 1909, he registered the defendant company, which was established with the object (amongst others) to acquire the goodwill of the business "now carried on at No. 6, King Street and 5, Paved Court, Richmond, in the county of Surrey, under the style or firm of James Churchill, to carry on the said business or any branch thereof as naturalists, taxidermists, dog and animal dealers, veterinary surgeons, to manufacture and sell all kinds of veterinary medicines and preparations." At the first statutory meeting of the company held on June 3, 1909, the appointment of the defendant Churchill as the sole director and manager of the company was confirmed, and the resignation of the other signatories to the memorandum of association as directors was accepted.

The action was commenced in July, 1909, and the statement of claim alleged (1.) that the company was formed by the defendant Churchill for the purpose of wrongfully and fraudulently deceiving and injuring the public and the members of the college and other persons registered under the Acts for the protection of veterinary surgeons by holding the company out as being conducted by persons specially qualified to practise the art of veterinary surgery; (2.) that by reason of the premises the public were likely to be induced and were induced to believe that the company or the persons who were carrying on the same were specially qualified to practise the said art, whereas in truth and in fact neither the company nor any one in connection therewith was registered or was capable of being registered under the said Acts or qualified to practise the said art; and (3.) that the company was formed for an unlawful purpose, namely, for the purpose of imposing upon the public and depriving persons duly qualified under the said Acts of the fees and charges which they were entitled to charge under the said Acts; and the plaintiff claimed an injunction as above stated.

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The defendants denied the allegations in the statement of claim.

It appeared that on the fascia of the shop where the business of the defendant company was carried on were the words "Churchill's Veterinary Sanatorium Limited," and that on the shop window was inscribed "James Churchill, Managing Director, M.D., U.S.A. Specialist. Dogs and cats boarded. Advice gratis." The defendants kept no books of account, but there was evidence that in January last the defendant Churchill had prescribed for a cat and had charged and received a fee of 5*s*.

Jenkins, K.C., and *Morton Smith*, for the plaintiff. There is not much authority on the Act. We object to the use of the words "veterinary" and "specialist." In *Royal College of Veterinary Surgeons* v. *Robinson* (1) an unqualified person was held not entitled to use the words "veterinary forge," and in *Royal College of Veterinary Surgeons* v. *Collinson* (2) an unqualified person was held not entitled to use the words "canine specialist." Sect. 17 of the Act is very similar to s. 3 of the Dentists Act, 1878 (3), and it is submitted that the principles of the decisions under the Dentists Act apply to the present case. It may be that a limited company is not a "person" within the meaning of s. 17 of the Act of 1881: *O'Duffy* v. *Jaffe* (4); *Pharmaceutical Society* v. *London and Provincial Supply Association* (5); but in *Rex* v. *Registrar of Joint Stock Companies for Ireland* (6) a mandamus to compel the registrar to register a company whose name contained the word "dentist" was

(1) [1892] 1 Q. B. 557.

(2) [1908] 2 K. B. 248.

(3) The Dentists Act, 1878, s. 3: "A person shall not be entitled to take or use the name or title of 'dentist' (either alone or in combination with any other word or words), or of 'dental practitioner,' or any name, title, addition, or description implying that he is registered under this Act or that he is a person specially qualified to practise dentistry, unless he is registered under this Act.

"Any person who . . . . not being registered under this Act, takes or uses any such name, title, addition, or description as aforesaid, shall be liable, on summary conviction, to a fine not exceeding £20; provided that nothing in this section shall apply to legally qualified medical practitioners."

(4) [1904] 2 I. R. 27.

(5) (1880) 5 App. Cas. 857.

(6) [1904] 2 I. R. 634.

refused, such use of the word being calculated to deceive the public, and in *Attorney-General* v. *Appleton, Ld.* (1), *Attorney-General* v. *Myddletons, Ld.* (2), and *Attorney-General* v. *George C. Smith, Ld.* (3) an injunction was granted restraining a limited company from representing that it comprised or employed individuals specially qualified to practise dentistry. Here the word "veterinary" implies a qualification, and the description of the defendant Churchill infers that he is specially qualified to practise veterinary surgery. The company and Churchill are in fact guilty of a conspiracy to evade the provisions of the Act of 1881, and, although the company cannot be prosecuted under the Act, they cannot combine with an individual in carrying on the business of veterinary surgery without employing qualified persons. That is a fraud on the public, and an injunction will lie at the suit of the Attorney-General to restrain the continuance of the offence: *Attorney-General* v. *Shrewsbury (Kingsland) Bridge Co.* (4); *La Société Anonyme des Anciens Établissements Panhard et Levassor* v. *Panhard Levassor Motor Co.* (5)

Hemmerde, K.C., and *Croom-Johnson*, for the defendants. The company are not a "person" and cannot be prosecuted under s. 17 of the Veterinary Surgeons Act, 1881: *Pharmaceutical Society* v. *London and Provincial Supply Association.* (6) The plaintiff can only succeed on the ground of fraud, and the onus of proof is on him. Here there is no proof that the company was formed for the purpose of evading the provisions of the Act. The words "veterinary sanatorium" and "specialist" are not of themselves evidence of fraud, and the company are entitled to use them. The description forbidden by s. 17 of the Act is a description of the person as distinguished from the acts done by the person, and the expression "specially qualified" in the section refers to a qualification in the nature of a degree or diploma and not to personal skill: *Bellerby* v. *Heyworth* (7); *Byrne* v. *Rogers.* (8) The defendant Churchill has a degree.

(1) [1907] 1 I. R. 252.
(2) [1907] 1 I. R. 471.
(3) [1909] 2 Ch. 524.
(4) (1882) 21 Ch. D. 752.
(5) [1901] 2 Ch. 513.
(6) 5 App. Cas. 857.
(7) [1909] 2 Ch. 23; since affirmed, [1910] A. C. 377.
(8) [1910] 2 I. R. 220.

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He is an M.D. in the United States. He states that fact, and the word "specialist" only indicates that he is skilled in the treatment of animals. That is no holding out or representation by him or the company that he is a specially qualified practitioner under the Veterinary Surgeons Act. The plaintiff is really claiming a monopoly in the word "veterinary."

[NEVILLE J. referred to the definition of "veterinary" in the Imperial Dictionary, new ed., vol. iv. p. 560.]

The company are entitled to use the words "veterinary sanatorium," which only describe a home for dogs and cats, and are also entitled to employ unqualified persons so long as they are not described as specially qualified under the Veterinary Surgeons Act, 1881. The decision in *Attorney-General* v. *George C. Smith, Ld.* (1) is not of much weight because there the fraud was admitted and the action was undefended; but even in that case Swinfen Eady J. said he could not make an order against the defendant Smith personally, and it is submitted that, if an injunction goes against the company, there should be no order against the defendant Churchill personally. In all the Irish cases express words were used representing that the defendants were registered under the Dentists Acts.

No reply was called for.

NEVILLE J. I think, after consideration of the cases, that the question to be determined here is whether or not, having regard to what appears upon the front of the business premises of the defendant company, Mr. Churchill is described as, or is the subject of a description which states that he is, a practitioner of a branch of veterinary surgery. That is the way in which it is put in the case of *Attorney-General* v. *Myddletons, Ld.* (2), and that seems to me the proper view of the case. It is a question of whether or not a misrepresentation has been made, because it seems to me on the authorities to which I have been referred that, so far as the company is concerned, the company is not within the provisions of the Veterinary Surgeons Act; and consequently, so far as that statute goes, I find that there is nothing which

(1) [1909] 2 Ch. 524. (2) [1907] 1 I. R. 471.

prevents the company from calling itself Churchill's Veterinary Sanatorium, Limited. But I think what I have to consider is what the description of Mr. Churchill means in the connection with which I find it. I find, first of all, it is stated that he is "a doctor" of some kind; I then find it is stated that he is a "specialist," and that must mean a specialist in something; then I also find he is stated to be "managing director," and that must be a managing director of something; and, further, that he gives advice gratis. Well, now, inevitably, to make any sense of that description, I must look at the fascia over the shop window to ascertain what is really referred to. The reference is to Churchill's "veterinary sanatorium." I have no doubt that "veterinary" there refers, not to anything pertaining to beasts of burden, but to the art of healing animals. At all events it is difficult for the defendants to argue that it does not, because in the memorandum of association of the company that is the meaning which they attribute to it. But beyond that, I think that is its meaning in this connection, at all events, in the English language; and I think "veterinary sanatorium" is only another way of speaking of a hospital for animals, where the treatment and cure of animals are undertaken. The result is that "specialist" must by necessary reference mean "veterinary specialist," and the advice given must be advice with regard to the healing of the diseases of animals. I think, therefore, that I do find here a representation that Mr. Churchill is a practitioner of a branch, at all events, of veterinary surgery, and, that being so, I think that he is described in a way which is contrary to the provisions of s. 17 of the Act. That being so, it seems to me that both the company and Churchill himself are equally responsible. The premises are the company's; and the statement is made upon their premises. The statement is also made in respect of and by their managing director, who, as their agent, cannot shield himself where what he is doing is contrary to the provisions of the statute. I think, therefore, that the plaintiff is entitled to an injunction restraining both the defendants from using any description of Churchill stating that he is a veterinary surgeon or a practitioner of veterinary surgery or any branch thereof. I think that the injunction

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ought to go in that form, and that the defendants must pay the costs of the action.

Solicitor for plaintiff: *G. Thatcher.*
Solicitors for defendants: *H. C. Mossop & Co.*

H. L. F.

NEVILLE J. 1910 *July* 27, 28.

BATH *v.* STANDARD LAND COMPANY, LIMITED.

[1909 B. 1302.]

Principal and Agent — Management of Real Estates — Limited Company appointed Agent—Company employing its Officials in the Management on Commission and Salaries—Articles of Association—Accounts.

The principle that, in a contract of agency between individuals, the agent cannot make a profit for himself beyond the remuneration fixed by the contract, equally applies to the directors of a corporation that contracts with an individual to act as his agent at a certain remuneration.

Where, therefore, a limited company agreed with the plaintiff to manage, develop, and realize his estates on certain terms, and in the course of such management employed one of its directors, who was a solicitor, to act professionally for the estates and paid his bills of costs, which included profit items; another director, who was an estate agent, to manage at a salary a business connected with the estates; another director, who was an auctioneer, to act as auctioneer on all sales of the estates at the usual commission; and gave its secretary, who was a chartered accountant, an additional salary for keeping the books of the estates, which were of a complex nature:—

Held, that in taking the accounts between the plaintiff and the company under the agreement all the above salaries, commissions, and profit costs must be disallowed, although the company had power under its articles of association to employ its officers in such capacities and to pay them.

Kavanagh v. *Workingman's Benefit Building Society*, [1896] 1 I. R. 56, approved.

ACTION.

This was an action for an account to be taken of the management, development, and realization of the plaintiff's property under certain agreements, in these circumstances.

In 1887 the Creditors' Assets Company, Limited (the predecessors in title of the defendant company), was incorporated

under the Companies Acts, 1862 to 1886, with memorandum and articles of association, for the purpose of engaging in every kind of business and dealing with real and personal property. The articles provided that the number of directors should not be more than twelve nor less than three (of whom two should form a quorum), and for their remuneration; and article 66 expressly provided that "no contract or arrangement entered into on behalf of the company with any director shall be avoided, nor shall any director be liable to account to the company for any profit realized by him from or under any contract of the company, by reason only of such director holding that office, or of his fiduciary relation to the company, provided that the precise nature of the interest of the director in such contract be declared to the board at the time the same is entered into; but no director shall vote in respect of any contract or arrangement in which he shall be interested . . . .

"It is also expressly provided that a director shall not be disqualified by reason of his being a member of a firm who are or may be the solicitors of the company, and any such appointment may be made by the board."

Early in 1893 the plaintiff, who had been adjudicated bankrupt, applied to the Creditors' Assets Company, Limited, for financial assistance, and it was arranged between them that, on the company providing the necessary moneys to enable him to pay his debts in full and so procure the annulment of his bankruptcy, certain of his real estates of considerable extent in the county of Kent should (subject to the mortgages thereon) be vested in the company to manage, develop, realize, and dispose of on certain terms and conditions. This arrangement was embodied in an agreement under seal dated April 20, 1893, of which the material clauses were as follows:—

1. That the company should, when and so soon as it should have provided all necessary moneys to carry out the said scheme, and the property set forth in the second schedule thereto should have been duly vested in the company, proceed to manage, develop, realize, or dispose of the property in such manner as the company in their discretion should think fit, but subject to the provisions thereinafter contained, and for that purpose might

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advance any money for the redemption or transfer of any mortgages or charges on the property, and from time to time sell or concur with any other persons in selling the whole or any part or parts thereof either subject to or freed from any mortgages or charges thereon, and lease, let, or otherwise in all respects deal with the property in such manner as the company in their discretion should think fit, and in the management, development, realization, or disposal of the property might advance any moneys for the improvement thereof and incur any costs, charges, and expenses necessary or proper for the purposes aforesaid.

6. That the plaintiff might at any time purchase such part of the property as might remain unrealized by the company on the terms therein mentioned.

7. "The company shall at all times until such purchase (if any) keep proper accounts in books showing the receipts and expenditure of all moneys payable or receivable under this agreement or in connection therewith or with the property dealt with thereunder, and such books shall be produced free of charge for the inspection of Mr. Bath or his agent at the company's office or at their solicitor's or accountant's office in London at all reasonable times on the reasonable request of Mr. Bath or his authorised agent, who shall thereupon be entitled to take copies thereof or extracts therefrom, and the company will on demand deliver to Mr. Bath at his expense copies of all such entries and accounts."

8. "The company shall be entitled to charge on such part of all moneys paid by them as may remain as a balance in their favour at the end of each three months, after crediting all receipts during the same period, interest at the rate of 6*l.* per cent. per annum, but such interest shall not bear interest."

9. "Two separate accounts shall be kept by the company, one in respect of income, the other in respect of capital, and Mr. Bath shall be entitled within one month after the end of each three months from the date of this agreement to one-third of any profit if any arising on such income account and the company shall be entitled to retain the remaining two-thirds towards the principal moneys for the time to time remaining due to them,

but any loss on one income account shall first be made up out of any profit on the following income account."

11. "After the company has been recouped all moneys payable to them in respect of any mortgages or securities held by them and in respect of any moneys paid by them in pursuance of the said scheme and in respect of advances made under this agreement with interest as provided by clause 8 hereof, and in respect of any other moneys due to them under this agreement or otherwise, and Mr. Bath shall not have purchased as aforesaid, the surplus profit and unrealized property shall be divided between Mr. Bath and the company as follows, namely, two-thirds to Mr. Bath and one-third to the company."

12. That "surplus profits" wherever in this agreement referred to should mean the total amount realized from the sale of the property less the moneys paid by the company and the interest and costs which by the terms of the agreement they might be entitled to charge.

16. That if and when the company should have been paid or received the full amount of the moneys due to them in respect of the property under this agreement, including interest and costs and one-third of the surplus profits and one-third of the value of the unrealized property to be paid to them as aforesaid, Mr. Bath should in addition to his other rights under this agreement be entitled to a conveyance from the company for his own benefit of such part of the property as might then be unrealized.

In accordance with this agreement the company duly provided Mr. Bath with the necessary funds to pay his creditors, and thereupon his bankruptcy was annulled, and the property comprised in the agreement was duly vested in the company, who thenceforward held and proceeded to deal with the same upon the terms of the agreement.

In 1899 the name of the company, with the sanction of the Board of Trade, was altered to the Standard Land Company, Limited. In 1900 disputes arose between the plaintiff and the company in relation to the accounts under the agreement, and he commenced an action against the company which was settled upon the terms mentioned in an order dated November 21, 1902, which provided (inter alia) that the plaintiff and the company

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should "cry quits" as regards accounts up to September 30, 1902, and that in future the accounts should be prepared on certain lines which modified the provisions of the agreement of 1893. The order also provided that Mr. Bath should be at liberty to attend board meetings of the company with regard to matters connected with his estates.

In 1905 the company was reconstructed under the name of the defendant company, and the defendant company took over all the property, assets, contracts, liabilities, and obligations of the old company, and thereafter continued the management of the plaintiff's property under the agreement of 1893 as modified by the order of 1902. In 1907 the agreement of 1893 was further modified by an agreement between the plaintiff and the defendant company.

The articles of association of the defendant company provided that the number of directors should be not less than four or more than seven, and fixed the remuneration of the directors; and article 88 provided that a director might hold any other office under the company in conjunction with the office of director, except that of auditor, and on such terms as to remuneration and otherwise as the directors might arrange in particular, and that a director should not be disqualified by reason of his being a member of the firm who were or might be the solicitors or auctioneers or surveyors to the company, and that any such appointment might be made by the board. Notices of board meetings were sent to the plaintiff, some of which he attended and some he did not. Quarterly accounts were sent regularly to the plaintiff, but he did not agree them, and ultimately in April, 1909, he commenced the present action against the defendant company, alleging that both the defendant company and its predecessor the old company had acted in contravention of the provisions of the agreement of 1893 as modified as aforesaid, and in particular had made improper charges in their accounts, namely, "disbursements of sums of money made to various directors and officers of the company in respect of salaries and fees as receivers, managers, accountants, surveyors and auctioneers, secretaries, law and other costs and commissions"; and the plaintiff claimed (amongst other things) that an account

might be taken of the management and development and realization of the property and of all dealings under the agreement of 1893 as modified as aforesaid, and of what sums ought properly to be allowed in respect of disbursements and what sums ought properly to be charged against the defendant company for moneys which they or the former company had received or ought to have received, and the sums which ought to be paid and credited to the plaintiff as the result of such account. The defendant company denied all the alleged improper disbursements, and in particular asserted (*a*) that no disbursements had been made except in the ordinary and proper course of the business of the defendants and of the former company respectively and in the proper carrying out of the said agreements and order; (*b*) that payments had been made to the solicitors of the company for their professional costs properly incurred in the ordinary course of business but not otherwise; and (*c*) that no unnecessary or improper disbursements had been made, that any disbursements made had been made in the ordinary and proper course of business, and that the plaintiff had at all material times had full knowledge thereof.

The circumstances with respect to the alleged improper disbursements were these. In 1905 the directors of the old company were Mr. May (the chairman), Dr. Ranger, Mr. Ramsay, Mr. Corke, and Mr. Snelling; and Mr. Reeves was the secretary. These gentlemen continued in office and, on the reconstruction of the old company in 1905, became and remained respectively the directors and secretary of the defendant company. Mr. May was a solicitor and a member of the firm of May, Sykes & Co., and his firm were employed professionally by the defendant company in matters connected with the estates, and their bills of costs, which contained profit items, were paid by the company. Mr. Corke was an estate agent and surveyor and was employed by the defendant company at a salary of 200*l.* per annum to manage certain sand and gravel pits comprising part of the estates, and the business in connection with these pits occupied a large portion of his time and was carried on at a considerable profit. Mr. Snelling was an auctioneer and was always employed by the defendant company on all sales of the property and was

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paid the usual commission. Mr. Reeves was a chartered accountant and, in addition to his salary as secretary of the company, was paid 80*l.* per annum for keeping the books of account of the estates, which were very complicated. It was not alleged that these payments were in themselves unfair or unreasonable, but it was objected that they could not be charged against the plaintiff.

Felix Cassel, K.C., and *J. M. Stone*, for the plaintiff. The company has managed and realized the plaintiff's property under a contract which defined its remuneration, and the plaintiff was entitled to the services of the officials of the company in carrying out the contract, but several of the directors and the secretary have made separate profits for themselves out of the business. The plaintiff is entitled to an account against the company, to have all the disbursements made by the company to its directors and the secretary by way of salaries and commission in managing the property disallowed, and the solicitor director's costs which were paid without being taxed should be moderated and the profit items disallowed. All these payments are within the absolute rule of equity that a man in a fiduciary position is not allowed to put himself in a position in which his interests conflict with the interests of those whom he is bound to protect: *Kavanagh* v. *Workingman's Benefit Building Society* (1); *Aberdeen Ry. Co.* v. *Blaikie Brothers* (2); *Nicholson* v. *Tutin*. (3) As to the profit costs, in *Bray* v. *Ford* (4) the House of Lords held that it was a misdirection in a libel action to tell the jury that an officer of a college could act as their solicitor and charge profit costs. It is claimed that the payments in question are out of pocket expenses of the company, but the company is in this dilemma: either the payments are extra remuneration to the directors for doing this work and so cannot be charged against the plaintiff, or they are improper payments which the company can recover from its officials and so are not out of pocket expenses. The plaintiff is not bound by acquiescence, for he had no knowledge of his rights and, moreover, has not agreed the accounts.

(1) [1896] 1 I. R. 56.
(2) (1854) 1 Macq. 461.
(3) (1857) 3 K. & J. 159.
(4) [1896] A. C. 44, 47.

Jenkins, K.C., and *H. C. Bischoff*, for the defendant company. Four classes of payments are objected to as improper, but the objection cannot apply to the solicitor director's bills of costs and auctioneer's costs.

Felix Cassel, K.C. We only object to those costs so far as they were profit costs, but all the payments to Reeves and Corke are objected to.

Jenkins, K.C. The company were in a fiduciary position to the plaintiff, and the question is what expenditure is to be allowed to it in managing the estates. A trustee acting honestly in the management of estates is entitled in proper cases to employ accountants, solicitors, auctioneers, and others. The directors of the company stand in a fiduciary position to the company and its shareholders, but do not stand in a fiduciary position to the plaintiff: *Poole, Jackson and Whyte's Case.* (1) If outsiders had been employed by the company all these payments would be allowed. Why then should they not be allowed in an honest case like the present? None of the cases cited are in point. The nearest is the Irish case, but that decision, it is submitted, is not in accordance with English law. The articles of association of the company are notice to all the world of the manner in which the company conducts its business, and by the articles the directors can make profits out of their contracts with the company. The plaintiff must be taken to have notice of the articles and cannot recover these payments from the directors; the principle of *In re Sykes* (2) applies. Further, the plaintiff raised the same objections in the previous action of 1900. He has known all along of the company's methods in managing the estates, and it is too late for him now to object.

No reply was called for.

NEVILLE J. There is one point of general importance to be decided in this case. If the agreement had been with an individual, it is quite clear that in the management and realization of the property committed to his charge he could not have made a profit to himself outside the remuneration provided for him in the agreement itself; and that would have been, in my

(1) (1878) 9 Ch. D. 322, 328. (2) [1909] 2 Ch. 241, 248.

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opinion, because he was in a fiduciary position to the other party to the contract; and although in proper cases he might have expended money for the doing of work which he himself preferred not to do, he could not, if he chose to do the work himself, have charged his cestui que trust with the amount. What I have to consider is whether the principle to which I have referred applies to the case of directors of a limited company. Here the owner of property transferred it to the company for the purpose of management and realization, the remuneration provided being an allowance of 6 per cent. on all moneys advanced by the company, and a provision that one-third of the profit on the ultimate realization of the property should belong to the company. The directors of the company by resolutions appointed members of the board to act as solicitor in the business, to act as manager in the business, and to act as auctioneer in the business. The question is whether the company are entitled to charge the plaintiff for the services of these directors. In my opinion they are not. The board of directors are the brains and the only brains of the company which is the body, and the company can and does act only through them. The fact that the board consists of more than one member does not seem to me to be of the least importance. I think what I am going to say is just as applicable whether there is only one managing director or whether there are more managing directors. I do not think, if the company, acting through its board, appoints a member of the board itself to do business for some one in respect of whom the company is in a fiduciary position, that the company can charge, as an expense properly incurred, the money so paid. It appears to me that there, as was argued on behalf of the plaintiff, you do get a case in which the interest and the duty of the members of the board are in conflict, and that if the Court were to limit the generality of the prohibition against making profit by trustees so as to enable the board of directors to make a profit out of persons dealing with their company, in respect of whom the company is in a position of trust, it would be a very serious and unfortunate limitation of the application of the rule. The actual point does not seem to have been decided hitherto in the English

Courts, but it has been decided by the Irish Court of Appeal in *Kavanagh* v. *Workingman's Benefit Building Society* (1), and the reasoning of the learned judges in that case, if I may respectfully say so, commends itself to my mind. I ought to add this. I have hitherto been speaking of a company regardless of its articles of association; but it is said, and said truly, that in the articles of the present company, or rather those of the predecessor of the present company (I think they are the important articles to consider), there was, at the time the contract was entered into, an article allowing contracts to be made between the board and their own members in respect of the business of the company; and it has been argued that, inasmuch as all the world has notice of the provisions of the articles of association, a person accepting such a company in the position of trustee cannot complain if the board appoints its own members and charges their remuneration against him. It seems to me that is not so. I think that article deals only with the relations between the shareholders of the company and the directors, and that it has no bearing upon the dealings of a third person with the company, for the very obvious reason that the third person dealing with the company is not a party to the contract contained in the article of association.

Then, coming to matters of detail, one question is whether the company was entitled to make charges against Mr. Bath for the keeping of the accounts. That depends upon the proper construction of the agreement of April 20, 1893. They undertook to manage, develop, realize or dispose of the property for the consideration that I have referred to, and they are entitled to charge against Mr. Bath "any costs, charges and expenses necessary or proper for the purposes aforesaid"; that is, for the management, development, realization or disposition of the property comprised in the agreement. Section 7 provides for the keeping of proper accounts, "showing the receipt and expenditure of all moneys payable or receivable under this agreement or in connection therewith"—I think that includes receipts and payments in respect of carrying on the business which was part of the property vested in them by the agreement—"or with

(1) [1896] 1 I. R. 56.

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the property dealt with thereunder, and such books shall be produced free of charge for the inspection of Mr. Bath or his agent at the company's office or at their solicitor's or accountant's office." It is said that although they were to produce the accounts for the inspection of Mr. Bath free of charge, yet it was intended that the costs of keeping those accounts should be costs, charges, and expenses necessary and proper for the purposes of the agreement. I do not take that view. I do not think the costs of keeping proper accounts were intended to be included in those costs, charges, and expenses. I think the company was bound to keep these accounts free of charge to Mr. Bath. The next point that arises is with regard to the employment of the auctioneer. The auctioneer employed in many cases, not all, was Mr. Snelling, one of the directors, but it appears plainly from the correspondence that in certain cases Mr. Bath himself was consulted and approved of the appointment of Mr. Snelling to act as auctioneer, and wherever his approval can be proved I think the company are entitled to charge the commission against Mr. Bath. Another point is whether, supposing the rights of Mr. Bath originally to have been as I have stated, he has done anything to deprive himself of the right to insist upon that position. I do not think he has. The matter has no doubt gone on for a considerable time; accounts have passed between the parties, and Mr. Bath has, according to the evidence of the defendants, constantly grumbled; but the question is did he, knowing that he was under no liability to recoup the company the charges made in respect of the employment of their own directors, voluntarily agree, notwithstanding his equitable rights, to allow such expenditure against him by the company? I cannot find in the correspondence any communication from him voluntarily surrendering any right that he knew of, or agreeing to pay anything more than he was legally bound to pay. I think, therefore, that his rights remain, and that as from the order of 1902, which I think deals with the past and only with the matters particularly specified for the future, he is entitled to an account.

I must declare that upon the taking of the accounts the company is not entitled to charge against the plaintiff profit or

remuneration paid to its directors in respect of work done by them under the agreement of April 20, 1893, as modified by the order of November 21, 1902, and the agreement of 1907. I ought to add that I do not see anything in the agreement of 1907 which affects the right of Mr. Bath to have the accounts taken according to the equities which have existed from 1902 onwards. I think it right to direct that the accounts shall stand as prima facie evidence of the receipts and payments appearing therein, and I reserve the costs of the trial as well as the costs of taking the accounts.

Solicitors: *Stones, Morris & Stone; May, Sykes & Co.*

H. L. F.

In re BARRANCE.
BARRANCE *v.* ELLIS.

[1907 B. 3128.]

Will—Effect of Probate—Codicil consisting of List of Names and Pecuniary Amounts—Gift of Legacies.

A document containing no words of gift, but giving a list of the names of eight persons, and after each name stating a sum of money, was admitted to probate as a codicil:—

Held, that (the Court being bound to assume that all documents admitted to probate are testamentary documents, and it being its duty to construe them in order to ascertain the testator's intention as to the disposition of his property and within the limits allowed by law to give effect to that intention) the codicil must be construed as giving to each person named a legacy of the amount set after his name.

In re Campsill, (1910) 128 L. T. Jour. 548, not followed.

Charles Barrance by his will, dated April 11, 1906, appointed P. Ellis and W. J. Davis executors and trustees thereof, and he thereby gave to each of them and to several other persons (not including any of the persons named in his codicil) certain pecuniary legacies; and the testator gave and devised the residue of his real and personal estate to his trustees upon trust to convert the same and invest the proceeds, and out of the income to pay certain annuities, and he directed the residue of his income to be accumulated and reinvested until the youngest

PARKER J. 1910 BARRANCE, *In re.* BARRANCE *v.* ELLIS.

of the children of his four brothers should attain the age of twenty-one years, at which time the capital and income and accumulations (subject to the annuities) were to be divided amongst the children; and after making certain provisions with reference to his business, the testator gave his trustees power to postpone the conversion of his estate.

Subsequently the testator signed a document which was as follows:—

"Georgina Randall £100
Helen Drusle £50
Mary Jane Green £50
Emma Margaret Landermann £50
Rose Wood £50
Sophia Coults Doscel £100
Joseph Knight £10
Maid Annie £10

(Signed) Charles Barrance.

Witness
F. R. B. Bisshopp June 22, 1906.
Witness
Gertrude Louise Ellis
15, Queen's Road,
Tun. Wells."

The testator having died, his will was proved on August 22, 1906, and at the same time the above-mentioned document was admitted to probate as a codicil.

In answer to inquiries in an order for administration of the testator's estate, the Master certified that the persons named in the codicil were legatees in respect of the sums therein set opposite their names.

One of the annuitants took out a summons to vary the certificate by omitting the names of these persons from the Master's schedule of legatees annexed to the certificate.

The summons was heard by Parker J. on June 29, 1910.

Tomlin, for the applicant. The so-called codicil should be disregarded by the Court. Even if it is a testamentary document, as established by the admission of it to probate, the

Court may hold it to be of no avail as a disposition of property: Jarman on Wills, 5th ed. vol. i. p. 29; *Gawler* v. *Standerwick.* (1) The list of names and sums of money is not necessarily a list of legatees and legacies to be paid to them; it may be a list of creditors or other persons. The testator, as his will shews, knew perfectly how to give legacies when he desired to do so. The document is void for uncertainty, as was decided in a similar case before Eve J.: *In re Campsill.* (2)

G. D. Pepys, for another person in the same interest as the applicant. Granting probate only means that the document is referred to the Court: *In the Goods of Mundy.* (3)

H. S. Preston and *F. P. Fausset*, for other parties.

George Hart, for a person named in the document proved as a codicil. *In re Campsill* (2), even if adequately reported, does not lay down any principle, and as a recent decision of a judge of co-ordinate jurisdiction it is not binding here: *Osborne to Rowlett* (4); *In re Ravensworth.* (5) Having regard to the fact that the document of June 22, 1906, has been admitted to probate, it cannot be disputed that the document is a codicil. The natural inference is that the list which it contains is a list of legatees and the legacies which they are to take, and the onus lies on those who say that the list is something else to shew that it is so.

Tomlin in reply.

Cur. adv. vult.

July 1. PARKER J. This Court is bound to assume that all documents admitted to probate are testamentary documents. Its duty is to construe them in order to ascertain the testator's intention with regard to the disposition of his property, and, within the limits allowed by law, to give effect to such intention.

In the present case a document executed by the testator on June 22, 1906, has been admitted to probate as a codicil. It contains the names of eight persons, and after each name there

(1) (1788) 2 Cox, 15, 19.
(2) 128 L. T. Jour. 548.
(3) (1860) 30 L. J. (P. M. & A.) 85.
(4) (1880) 13 Ch. D. 774.
(5) [1905] 2 Ch. 1.

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is stated a sum of money, but there are no words of gift. I am, however, of opinion that considering the testamentary nature of the document I ought to construe it as a gift to each person named of the sum which follows his or her name, there being nothing in the surrounding circumstances to negate or throw doubt upon such a construction.

With regard to the case of *In re Campsill*, I cannot discover that it is reported elsewhere than at page 548 of the *Law Times Journal* of April 16, 1910, and I think it must have turned on the particular circumstances of the case, and cannot have been intended to lay down any rule of general application.

The summons, therefore, must be dismissed. The question, however, being one of construction, the costs of the summons will be costs in the action and provided for by the order on further consideration.

Solicitors: *Sharpe, Pritchard & Co., for W. C. Cripps, Son & Daish, Tunbridge Wells; Ford, Lloyd & Co.; Nye, Moreton & Clowes, for J. K. Nye & Donne, Brighton; Robbins & Co.*

F. E.

In re GRAMOPHONE COMPANY'S APPLICATION.

PARKER J.

1910

June 7, 8. 9, 14, 15, 16; *July* 5.

Trade Mark—Word directly referring to Character of Goods—Distinctive Word—Name of Article as Trade Mark for it—"Gramophone"—Registration—Protection to other Traders—Trade Marks Act, 1905 (5 *Edw.* 7, *c.* 15), *ss.* 9, 44.

The Gramophone Company, Limited, and its predecessors in title had before and after the incorporation of the company manufactured and sold talking machines, and for many years had sold and advertised the machines as "gramophones," and the company claimed monopoly rights in the word, as distinguishing goods of the company's manufacture, by warning circulars, legal proceedings, and threats of legal proceedings. To the general public the word "gramophone" denoted a talking machine operating a disc record without any connotation of the source of manufacture; but to the trade generally the word denoted a talking machine of a particular type and connoted the source of manufacture. The company applied for registration under s. 9, sub-s. 5, of the Trade Marks Act, 1905, of "gramophone" as the company's trade mark in respect of gramophones and sound recording and reproducing instruments, records, parts and accessories:—

Held, that, "gramophone" being the name of the article sold, even assuming the word had by user become distinctive of the company's goods, the application for registration ought not to proceed.

An application under s. 9, sub-s. 5, of the Act in effect admits that the word sought to be registered (not being a geographical name or a surname) has some direct reference to the character or quality of the goods in respect of which it is proposed to be registered.

In the case of a trade mark in actual use, the tribunal, when taking into consideration the extent to which user has rendered the mark in fact distinctive of the applicant's goods, can only have regard to user upon or in connection with goods for the purpose of indicating that such goods are the goods of the person so using the mark, and the acquired distinctiveness must be due to such user.

If a word which has once been the name of an article ought ever to be registered as a trade mark for that article, it can only be when the word has lost, or practically lost, its original meaning; and so long as the word appropriately describes the article registration ought to be refused.

Observations on s. 44 of the Act.

THE Gramophone Company, Limited, in December, 1908, applied at the Patent Office for registration under sub-s. 5 of s. 9 of the Trade Marks Act, 1905, of the word "gramophone" as the company's trade mark in class 8 in respect of gramophones and sound recording and reproducing instruments, records, parts

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and accessories, being apparatus included in class 8. The case of the applicant company was lodged in March, 1909, and was referred by the Comptroller to the Board of Trade, which required the company to make a special application to the Court by motion. (1)

The word "gramophone" was apparently invented by Emile Berliner, who used it as signifying a machine made under a patent taken out by him in 1887. His process was applicable to operate both disc records and cylinder records, but was only used in the former way, and before 1896 the word was beginning to or did denote in England machines operating disc records, as distinguished from phonographs or graphophones which operated cylinder records.

In 1897 Berliner transferred his European rights in respect of the patent to a person who in 1899 transferred his rights to a company, which sold machines made under the patent as

(1) Sect. 9 of the Trade Marks Act, 1905 (5 Edw. 7, c. 15), is as follows:

"A registrable trade mark must contain or consist of at least one of the following essential particulars:—

"(1.) The name of a company, individual, or firm represented in a special or particular manner;

"(2.) The signature of the applicant for registration or some predecessor in his business;

"(3.) An invented word or invented words;

"(4.) A word or words having no direct reference to the character or quality of the goods, and not being according to its ordinary signification a geographical name or a surname;

"(5.) Any other distinctive mark, but a name, signature, or word or words, other than such as fall within the descriptions in the above paragraphs (1.), (2.), (3.) and (4.), shall not, except by order of the Board of Trade or the Court, be deemed a distinctive mark:

"Provided always that any special or distinctive word or words, letter, numeral, or combination of letters or numerals used as a trade mark by the applicant or his predecessors in business before the 13th day of August, 1875, which has continued to be used (either in its original form or with additions or alterations not substantially affecting the identity of the same) down to the date of the application for registration, shall be registrable as a trade mark under this Act.

"For the purposes of this section 'distinctive' shall mean adapted to distinguish the goods of the proprietor of the trade mark from those of other persons.

"In determining whether a trade mark is so adapted, the tribunal may, in the case of a trade mark in actual use, take into consideration the extent to which such user has rendered such trade mark in fact distinctive for the goods with respect to which it is registered or proposed to be registered."

"gramophones," but in 1900 sold the rights to the applicant company, then called the Gramophone and Typewriter Company, Limited. The applicant company continued to manufacture talking machines under the Berliner patent until it expired and to sell them as gramophones. After that and some other patents had expired, other disc machines by various manufacturers came on the market and were sold under fancy names such as "dulcephones" and "coronaphones," but the applicant company continued to sell its machines as "gramophones," advertised them under that name, and further claimed monopoly rights in the word, as distinguishing machines of its own manufacture, by warning circulars, legal proceedings, and threats of legal proceedings.

At the date of the application "gramophone" to the general public denoted a disc talking machine without any connotation of the source of manufacture; but to the trade generally it denoted a talking machine of a particular type and connoted the source of its manufacture. The facts are more fully stated in the judgment of Parker J.

The company moved for an order directing the Comptroller to proceed with the registration of the word as a trade mark.

A. J. Walter, K.C., Romer, K.C., and *J. H. Gray*, for the applicant company. As "gramophone" has amongst the general public the meaning of a talking machine manufactured by the company and not merely a kind of talking machine without regard to its makers, the company is prima facie entitled to registration of the word on the principle of *Kodak, Ld.* v. *London Stereoscopic and Photographic Co.* (1) (as to the word "kodak") and *In re Burroughs, Wellcome & Co.'s Trade Marks* (2) (as to the word "tabloid"). Other traders will not be injured by the registration, as they will be protected by s. 44 of the Trade Marks Act, 1905.

Sir Rufus Isaacs, S.-G., and *Sargant*, for the Registrar of Trade Marks. The evidence does not shew that the word "gramophone" denotes to the public a talking machine of the company's manufacture. The company has never used the word as its

(1) (1903) 20 Rep. Pat. Cas. 337. (2) [1904] 1 Ch. 736.

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trade mark. The word is not an invented one, but a technical word forming part of the common stock of the English language, and the company cannot acquire a monopoly in such a word: *In re Cassella & Co.'s Application* (1) (as to the word "diamene"). That case shews that where technical English words are concerned principles are applicable similar to those which induce the Court to refuse registration to laudatory epithets as stated in the "Perfection Soap" case, *In re Joseph Crosfield & Sons, Ld.* (2)

The burden lies on the company to shew that "gramophone" has been taken wholly out of its ordinary meaning and acquired the secondary signification of denoting exclusively the goods of the company: *Wotherspoon* v. *Currie.* (3) The company has failed to sustain this burden. It has first taken its own name from the machine it makes, and now wants to describe the machine by that name. Wealthy corporations should not be allowed to obtain monopolies in words such as this, and the application ought to be dismissed.

A. J. Walter, K.C., in reply, referred to Kerly on Trade Marks, 3rd ed. pp. 43 et seq., 333; *Linoleum Manufacturing Co.* v. *Nairn.* (4)

[Parker J. referred to *Burberrys* v. *J. C. Cording & Co., Ld.* (5)]

H. B. Samuel held a watching brief for other persons interested.

Cur. adv. vult.

July 5. PARKER J. An application under s. 9, sub-s. 5, of the Trade Marks Act, 1905, in effect admits that the word sought to be registered (not being a geographical name or surname) has some direct reference to the character or quality of the goods in respect of which it is proposed to be registered. The word which in the present case the applicant company proposes to register as a trade mark is the word "gramophone," and the goods in respect of which the word is proposed to be

(1) [1910] 2 Ch. 240; 27 Rep. Pat. Cas. 453.
(2) [1910] 1 Ch. 130.
(3) (1872) L. R. 5 H. L. 508, 521.
(4) (1878) 7 Ch. D. 834.
(5) (1909) 26 Rep. Pat. Cas. 693.

registered are stated to be gramophones and sound recording and reproducing instruments, records, parts, and accessories, being apparatus in class 8. Besides the admission involved in the application, it is, in my opinion, abundantly clear on the evidence that the word "gramophone" has direct reference to the character of these goods. Whatever else it may connote it certainly denotes a talking machine, and almost as certainly a talking machine of a particular type. It can therefore only be registered in respect of talking machines if, notwithstanding this, it be in the opinion of the Board of Trade or the Court a distinctive word, that is, a word adapted to distinguish the talking machines of the applicant from those of other persons.

In determining whether a word is distinctive the tribunal may, in the case of a trade mark in actual use, take into consideration the extent to which such user has rendered it in fact distinctive of the applicant's goods. The applicant company contends that the word "gramophone" is a trade mark in actual use within the meaning of the section, and has by such user become distinctive of the applicant company's goods, and is, therefore, adapted to distinguish such goods from those of other persons, and ought to be admitted to registration.

The history of the word "gramophone," so far as I can trace it on the evidence before me, is as follows: The earliest talking machine was made under the Edison patent of 1878 and was called a phonograph. According to Edison's invention the sound line was traced on the record by a process of indentation. In 1886 Bell and Tainter obtained a patent for an improved machine, in which the sound line was cut or graved on the record as opposed to being indented. In both machines the sound line was what has been called an "up and down" or "hill and valley" line. Both methods of tracing the sound line were applicable to disc as well as cylinder records, but as a matter of fact no disc records appear to have been made by either method, at any rate during the life of the patents. Tainter and Bell called their machines graphophones to distinguish them from phonographs, but to the ordinary observer there was little difference in appearance between the two. In 1887 Berliner invented and obtained a patent for yet a third machine, in which

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the sound line was no longer an "up and down" or "hill and valley" line, but a sinuous line of even depth throughout traced on the record either by the graving method of Tainter and Bell or by a method of his own, which I will call the etching method. Berliner's process was also applicable both to disc and cylinder records, but during the life of his patent no records were made under it in cylinder form, and, further, during the life of the Tainter-Bell patent no records could be made under it, otherwise than by his etching method, the graving process being covered by the last-mentioned patent. Berliner called instruments made under his patent "gramophones" to distinguish them from phonographs or graphophones; and I think it probable that he invented the word, though both in his English and American specifications he appears to use it as an already existing word for a sound recording and reproducing instrument. Berliner's real invention was the sinuous sound line of even depth, but the chief apparent distinction between the phonograph or graphophone made under the Edison or Tainter-Bell patents and the gramophone made under the Berliner patent was that both the former, as actually made, operated a cylindrical record, while the latter, as actually made, operated a disc record. It was therefore quite natural that the word "gramophone" should to the general public come to denote a disc as opposed to a cylinder talking machine. Up to the year 1896 or 1897 Berliner's invention was not worked in, though some of his machines made in America were imported into, this country. There is in evidence an invoice dated November 24, 1891, in which the Foreign Novelty Company describe themselves as importers of gramophones, and in which appears a drawing of what is evidently a Berliner disc machine; and there are letters patent of December 5, 1891, in which the inventor claims to have avoided certain difficulties incidental to both phonographs and gramophones. Before 1896, therefore, the word was known in this country, and in my opinion it was coming to denote, if it did not already denote, a machine operating a disc record as opposed to a phonograph or graphophone which operated a cylinder record. Experts in machinery might, as I think they still may, use the three words as connoting the three methods of tracing the sound line, but

popularly "gramophone" was coming to denote a disc machine and "phonograph" a cylinder machine. The word "graphophone" was never very widely used. In 1896 or 1897 Berliner sold his English patent rights, including, I think, though the evidence is not quite clear, his rights in respect of certain patented improvements, to a private firm which called itself the Gramophone Company, taking its name from the instrument, and sold talking machines made under Berliner's patent as gramophones. In 1899 this firm transferred the business to a company incorporated under the style of the Gramophone Company, Limited, the objects of which, as defined by its memorandum of association, included (inter alia) the manufacture and sale of gramophones and phonographs and gramophone discs and phonograph cylinders. This shews that the gramophone was then looked upon as a disc machine as opposed to the phonograph, which was a cylinder machine. The last-mentioned company continued to sell machines made under Berliner's patent as gramophones, but in 1900 it transferred its business to a company with a larger capital, which at the same time acquired a business in typewriters, and was incorporated as the Gramophone and Typewriter Company, Limited. Its memorandum of association also included amongst its objects the manufacture and sale of gramophones and phonographs. The Gramophone and Typewriter Company, Limited, which, having dropped the typewriting business, is now called simply the Gramophone Company, Limited, and is the applicant company, continued to manufacture talking machines under the Berliner patent and to sell them as gramophones. In 1900 the Tainter-Bell patent expired, and the graving method being considered (as it no doubt is) superior to the etching method, the Gramophone and Typewriter Company, Limited, abandoned the latter altogether and adopted the former, continuing, however, to sell its talking machines as gramophones. There was nothing wrong in this, the essence of Berliner's invention being the sinuous sound line of even depth, and, even had this not been so, there is no evidence that the word "gramophone" connoted to the public any particular method of tracing the sound line, and there is evidence that it had come to denote a

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disc talking machine as opposed to the phonograph or graphophone which operated a cylinder record. The Berliner patent of 1887 expired shortly afterwards, and upon such expiry everybody became entitled to make disc machines according to Berliner's 1887 patent, either by the etching or the graving method, and so far as I can see to put them on the market as gramophones, the name given by the inventor to such machines. Both the Tainter-Bell patent and the Berliner patent having expired, a number of disc machines made by various manufacturers came on the market, but were not sold as gramophones, but under various fancy names, such as "dulcephone," "coronaphone," &c. No one except the applicant company sold disc talking machines as "gramophones." This may have been due, to some extent, to the fact that the applicant company still held patents for various improvements on Berliner's original invention, but it was also, in my opinion, largely due to the policy pursued by the applicant company.

Ever since the expiry of Berliner's 1887 patent the Gramophone Company, Limited, has adopted the following policy. On the one hand, it has largely advertised its machines as "gramophones," thus, so far as the public are concerned, continuing and emphasizing the original use of the word "gramophone" as the name of a particular sort of talking machine, and its popular use as denoting a disc as opposed to a cylinder machine. On the other hand, in its dealings with the trade it has consistently claimed monopoly rights in the word as denoting goods of its own manufacture only, and by warning circulars, legal proceedings, and threats of legal proceedings, has done its best to support the monopoly claimed. This policy is quite intelligible, for no monopoly can be more valuable than a monopoly in a word which the public use as the name of a particular article but the trade consider to be the name of that article when made, and only when made, by a particular manufacturer. I do not think I need examine in detail the mass of evidence produced at the trial. It will, I think, be sufficient to say that upon the evidence before me I am satisfied that the Gramophone Company, Limited, have met with a considerable degree of success in both branches of the policy adopted by them.

On the one hand, distinguishing the public from the trade, it is, in my opinion, clear that to the general public the word "gramophone" now denotes a talking machine with disc as opposed to cylindrical records, that is, a particular type of talking machine, and denotes this without any connotation of the source of manufacture. In this sense the word has found its way into dictionaries, is used in patent specifications, newspapers, and other current literature, and can be found even in arguments of counsel and the decisions of judges of the High Court. On the other hand, I think it equally clear that to the trade generally the word, while it still denotes a talking machine of a particular type, connotes also the source of manufacture of such machine. A retail dealer inquiring of a wholesale firm the prices of gramophones would almost certainly mean the prices of disc machines manufactured by the applicant company, but a member of the public making the same inquiry of a retail dealer would almost as certainly mean the prices of disc machines by whomsoever made. No doubt, as one would expect, it is easy to find exceptions to these generalizations. A member of the public who has had experience in the purchase of talking machines, or has made inquiry with a view to such purchase, might easily become acquainted with the connotation involved in the word "gramophone" among dealers; and, on the other hand, dealers in their transactions with members of the public might easily use the word as the public uses it, without any reference to the source of manufacture, whereas in their transactions with other dealers the connotation of the source of manufacture would be constantly present to their minds. Of course, too much stress ought not to be laid on occasional looseness of language; but I am satisfied that the use of the word "gramophone" by the public, as denoting the machine without any connotation of the source of manufacture, is general, and not occasional only, and I am equally satisfied that the use of the word by traders amongst themselves, without any connotation of the source of manufacture, is not general, but occasional only. For purposes other than trade purposes, however, even a person in the trade may readily use the word as denoting the article simply without further connotation.

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Indeed, how difficult it is even for those concerned in the trade to use the word "gramophone" as always connoting the source of manufacture is well shewn by the fact that the applicant company itself has not been able to avoid the use of the word in describing the class of goods for which it seeks to register the word "gramophone," and for which some years ago it applied for, and obtained, the registration of its trade mark known as "His Master's Voice."

An application to register a trade mark for gramophones contemplates that gramophones may be made by others; for to limit the class of goods in respect of which registration is sought to goods of the applicant's manufacture would, of course, be absurd. Further, in both applications the applicant company could apparently find no appropriate description of their business other than that of gramophone manufacturers. Starting, therefore, with a word used to denote a particular sort of article from the manufacture of which the applicant company and their predecessors, one and all, derived their trade name, we find that the word in question, so far from losing its original signification, has become popularized largely owing to the advertisements of the company as the name of that particular sort of article, though among traders the word, while still denoting the article, also generally connotes the manufacturer. The question is, whether under these circumstances the word "gramophone" ought to be admitted to registration as a word adapted to distinguish the applicants' talking machines from those of rival manufacturers.

Taking the word "gramophone" on its own merits and as it is used by the applicant company in their application for registration, and finding that it is the name of a particular sort of article, I cannot see that it is in itself more adapted to distinguish that article when made by one person from the same article when made by another than, for example, the word "match" would be adapted to distinguish the matches of one manufacturer from the matches of another. In itself, therefore, the word "gramophone" would be no more registrable for gramophones than the word "match" for matches. In other words, it could not on its own merits be deemed distinctive

within the meaning of s. 9, sub-s. 5. Everything, therefore, turns upon the question whether the word has become distinctive by user, and, if so, how far the Court is to be influenced by that fact.

It is to be observed that it is only in the case of a trade mark in actual use that the Court or the Board of Trade is authorized to take into consideration how far a word has become distinctive, and its acquired distinctiveness must be due to "such user," that is, I think, to user as a trade mark. A trade mark is defined in s. 3 as including (1.) a mark used and (2.) a mark proposed to be used upon or in connection with goods for the purpose of indicating that they are the goods of the proprietor of such mark. Apparently it is only in the former case that evidence of user is admissible under s. 9, sub-s. 5, and therefore, in my opinion, the user of which evidence is given must be user upon or in connection with goods for the purpose of indicating that such goods are the goods of the person so using the mark, and the acquired distinctiveness must be due to such user. I have considerable doubt whether the applicant company has ever used the word "gramophone" upon or in connection with disc talking machines for the purpose of indicating that such machines were of its manufacture. In advertising its gramophones it has used the word as the name of the article and not to distinguish the article when made by it from the same article when made by others. This seems to me the very reverse of user as a trade mark. No talking machine ever made by the applicant company has been marked with the word "gramophone." On the contrary, every machine so made has been marked with one or other of the applicant company's registered marks, such as "His Master's Voice." It is true that the records of the applicant company have borne the word "gramophone," but only accompanied with some registered trade mark and in such manner as to suggest a record for use on the instrument called the gramophone, and not a record made by the applicant company as distinguished from a record made by any one else. The nearest approach I can find in the evidence to the use of the word "gramophone" as a trade mark is its use by the applicant company on their packing cases, which have always been marked

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"gramophone" in large letters. Further, on the evidence before me, the connotation which the word "gramophone" bears among dealers seems to me to be due, not to its use by the applicant company as a trade mark, but to the long-continued insistence by the applicant company upon their monopoly rights in the word, backed by warning circulars, legal proceedings, and threats of legal proceedings. I am convinced that the risk of an expensive litigation with a wealthy corporation has been no small inducement to dealers to acquiesce in the rights insisted on.

Assuming, however, that the word has in the trade become distinctive under circumstances which I can properly take into account, there still remains the question whether the application to register it as a trade mark ought to be allowed to proceed. As to this it appears from the judgments of the Court of Appeal in the *Perfection Soap Case* (1) that, even where a word proposed to be registered has acquired a large degree of distinctiveness by user as a trade mark, the Court has a wide discretion in granting or refusing permission to proceed with an application for its registration. In that case the word "perfection" as applied to soap had acquired by user as a trade mark, both in the trade and to some degree also among the public, a secondary meaning connoting the soap of the persons applying for registration. The application was refused in the exercise of the discretion of the Court. The word was a mere laudatory epithet, likely to be required by others to describe their goods, and a monopoly in the use of which could not fairly be granted to any single manufacturer. It is to be observed that this reasoning prevailed notwithstanding s. 44 of the Act, under which, even after registration, any trader might have used the word "perfection" in any bona fide description of his own wares. Fletcher Moulton L.J. was of opinion that the Court might well ask itself the question whether, having regard to the rights of others under s. 44, the registration of the mark would cause substantial difficulty or confusion, and apparently he was of opinion that it would. The provisions of s. 44 were pressed upon me as affording a reason for allowing registration of the word

(1) [1910] 1 Ch. 130; 26 Rep. Pat. Cas. 854.

"gramophone." The rights of other traders, it was said, were fully protected by this section. The argument is somewhat double-edged. It suggests that others may bona fide require to use the word "gramophone" to describe the goods sold by them. In my opinion this is not at all unlikely. If the word "gramophone" primarily means, as I think it does, a particular type of talking machine irrespective of the maker, and if the public inquire, as I think they do, for this type of machine under this name, I can well believe that retail traders may desire to describe the goods they sell under the name by which such goods are known to the public. The circumstances may, of course, be such that it is incumbent on them to make it clear that the goods to which they apply the word are not the goods of the applicant company, but if they do this, I cannot see how the use of the word could be dishonest in the sense of likely to deceive.

It is, however, the use of the word to describe any instrument not made by it to which the applicant company objects and which they have for years been seeking to stop; and there can be no doubt that in spite of s. 44 the registration of the word as a trade mark would facilitate the end in view. If I were to advertise, asking gramophone makers to tender for the construction of twenty gramophones of a particular size and according to a particular specification, there would be nothing absurd or peculiar in the advertisement. Every one would understand its meaning. No one would think the invitation to be addressed only to the applicant company. Suppose in answer to my advertisement some one wrote that he had in stock and could supply me with twenty gramophones of the exact size and make required, I should understand the answer perfectly and should not necessarily expect goods of the applicant company's manufacture. There would be no room for a passing-off action based on some implied misrepresentation. Again, suppose a dealer advertised for sale "gramophones by all the chief manufacturers, including the Gramophone Company, Limited," his meaning would to any ordinary member of the public be perfectly clear, and he would be guilty of no misrepresentation, express or implied. On the other hand, if the word "gramophone" were registered as a trade mark, I am not sure that in either of the

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cases I have supposed the monopoly conferred by registration would not be infringed, and, if s. 44 were relied on as a defence, the question would at once arise whether the use of a word known to be on the register as a trade mark could be bona fide within the meaning of the section.

If a laudatory word such as "perfection" ought not to be admitted to registration, although among the trade it has become distinctive of the goods of a particular manufacturer, it seems to me to follow, a fortiori, that the name by which an article is popularly known ought not to be admitted to registration as a trade mark for that article, although in the trade it may have come to connote the source of manufacture. It may be asked, and was in effect asked at the trial, why such words as, for example, "pianola" or "vaseline" should be on the register as trade marks if "gramophone" were refused registration. The answer is not far to seek. None of the Trade Mark Acts have provided machinery for taking a mark off the register if once it has been properly put on, and it is quite unnecessary in an action for infringement of a registered mark to prove that such mark still remains distinctive of the goods of the registered proprietor. It may, therefore, be to the interest of the registered proprietor of a word mark that the word should lose its distinctiveness so far as the public are concerned and become the popular name for the article. He thus obtains a practical and perpetual monopoly in the article itself, other manufacturers being precluded by the mark on the register from selling their goods under the name by which they are commonly known. To induce the public to adopt a catching word as the name of the article to which it is applied, especially if the article be comparatively new, it is only necessary to advertise the article on a sufficiently large scale under that name, and this can be done by any rich corporation. Such a procedure would, or might, have been fatal to any remedy based upon common law rights, but does not affect the value of a registered mark the distinctiveness of which is assumed and need never be proved. Indeed, no evidence to prove that a registered mark was no longer distinctive would be in any way relevant. The old action for infringement of a common law trade mark was based only on

the duty of the Courts to prevent fraud and deceit, and the loss of distinctiveness was, therefore, fatal to its success. It is, however, one thing to put a word mark on the register and then proceed to induce the public to use it as the name of the article to which it is applied, and quite another thing to adopt a word already used to denote a particular article, and then proceed to identify it among the trade with the goods of a particular manufacturer, relying on such identification as a reason for registration. For the purpose of putting a mark on the register, distinctiveness is the all-important point, and in my opinion, if a word which has once been the name of an article ought ever to be registered as a trade mark for that article, it can only be when the word has lost, or practically lost, its original meaning. As long as the word can appropriately be used in a description of the articles or class of articles in respect of which a trade mark is proposed to be registered, so long, in my opinion, ought the registration of that word for those articles or that class of articles to be refused. There was, and would be now, no inappropriateness in applying to register "His Master's Voice" as a trade mark for gramophones. Apparently the applicant company sees nothing inappropriate in applying to register the word "gramophone" for gramophones. That this view seems to be supported by the trade only shews how profoundly the general notion of the functions of a trade mark has been modified by trade mark legislation. The notion of distinguishing gramophones made by the proprietor of the trade mark from gramophones made by others—in other words, the original and legitimate function of a trade mark—appears to be entirely lost in the idea of a trade monopoly in the name of an article, a monopoly which it appears to be thought any one who can afford it may secure by spending enough on advertisement, and of which, quite apart from any deceit or misrepresentation, it would be dishonest after such expenditure to attempt to deprive him. That a registered mark cannot be taken off the register, even though it has ceased to be used for the legitimate purpose of a trade mark and has become merely the name of an article, is, I think, no reason for allowing one trader to register and secure a monopoly in what is already the name of an article, although every trader in the

PARKER J. 1910 GRAMOPHONE COMPANY'S APPLICATION, *In re.*

kingdom might for one reason or another have already recognized or been willing to recognize such monopoly.

I have come to the conclusion, therefore, that the application to register the word "gramophone" ought not to be allowed to proceed; and I accordingly dismiss the application with costs.

Solicitors: *Broad & Co.; Solicitor to the Board of Trade; Bristows, Cooke & Carpmael.*

F. E.

PARKER J. 1910 *July 7.*

In re EVANS AND BETTELL'S CONTRACT.

[1910 B. 1898].

Will—Administration—Annuities and Legacies charged on Property—Provision of Fund to answer Annuities and Legacies — Continuing Liability of Residue—Vendor and Purchaser—Order discharging Property—Conveyancing and Law of Property Act, 1881 (44 & 45 *Vict. c.* 41), *s.* 5.

Where annuities and legacies are charged on property, the Court's jurisdiction to set apart a fund to answer the annuities and legacies and distribute the rest of the property is based on administration only, and the exercise of the jurisdiction does not release the rest of the property, which, if the fund fails to answer the annuities and legacies, may be followed into the hands of those who take it.

Notwithstanding the setting apart of the fund, a purchaser of part of the distributed property may validly object to the title in the absence of any release from the annuities and legacies and of an order under s. 5 of the Conveyancing and Law of Property Act, 1881.

WILLIAM BETTELL by his will, dated February 19, 1902, appointed three persons as executors and trustees thereof, and gave certain specific and pecuniary legacies, some of the pecuniary legacies being payable on the death or second marriage of the testator's wife. The testator directed, as to the residue of his realty and personalty, that the trustees should invest in trust securities such part thereof as should consist of money, and that out of the net income arising therefrom and from the remainder of his realty and personalty (which he desired his trustees to retain) they should pay certain annuities to his wife and others, one of these being payable on her death or remarriage. Subject to the annuities the trustees were to hold the property in trust to

pay a moiety of the remainder of the net income to the testator's son William during his life and the other moiety to his son Clarence for life; but the testator expressed it to be his will that on the death of one of the sons the trustees should, subject to the payment of the then existent annuities, pay the sum of 5000*l.* to the testator's wife for her absolute use and benefit, and pay a further sum of 5000*l.* to such children or child of the son first dying as should be living at the date of his death, and that the trustees should hold the residue of the trust premises in trust for the survivor of the two sons. The will further provided that if the testator's son first dying should not leave children or a child the trustees should hold the residue of the trust premises in trust for the surviving son, but subject to the payment of the then existent annuities and the 5000*l.* to the testator's wife.

The testator died on December 20, 1904, leaving his wife and the two sons alive.

The two sons, by a deed dated February 2, 1905, covenanted and agreed, by way of family arrangement, that, notwithstanding the trusts and provisions of the will, the residuary realty and personalty should be deemed to have been left by the testator in trust for the two sons equally, subject to the annuities and legacies and to their own life interests, and that it should, on the death of the son first dying (but subject to the annuities then payable and the legacy of 5000*l.* bequeathed to the testator's widow), be divided in equal shares between the personal representatives of the son first dying and the surviving son, provided that if the son first dying should leave a child or children living at his death the sum of 5000*l.* should be retained by the trustees out of his share to provide the 5000*l.* bequeathed to such child or children, and that the balance only of such share, after retaining such 5000*l.*, should be paid to such personal representatives, and that, as and when any annuities should cease to be payable, any funds or securities retained by the trustees to answer the annuities should be divided by the trustees in like manner.

The testator's two sons on June 30, 1909, issued an originating summons, intituled in the matters of the testator's estate and the arrangement deed, and to which the executors and trustees of the testator, his widow, an infant child of his son Clarence Bettell,

PARKER J. and the only other surviving annuitant entitled to an immediate annuity were defendants.

1. 10

EVANS AND BETTELL'S CONTRACT, *In re.*

On December 3, 1909, Joyce J. made an order on the summons declaring that the widow's legacy was vested, and directing the executors and trustees to transfer into Court two sums of Consols to answer the annuities, the legacies payable on the testator's widow's death or remarriage, the legacy of 5000*l* payable to her, and the legacy of 5000*l*. to the children of the son first dying. The order also provided that the annuitants were to be entitled, if the funds in Court were at any time insufficient to make the payments directed, to resort to the capital of the funds to make good the deficiency, and directed the executors and trustees, after and subject to such payment into Court and the payment or retainer of all other costs, charges, and expenses properly incurred by them in or about the administration of the estate and the execution of the trusts of the will, to transfer and pay to William Bettell one moiety and to Clarence Bettell the other moiety of the residue of the testator's estate and the income thereof.

The two sums of Consols having been paid into Court, the executors and trustees, in pursuance of the order, conveyed the testator's residuary real estate to William and Clarence Bettell in equal shares as tenants in common, freed and discharged from the trusts of the will.

William and Clarence Bettell on May 6, 1910, contracted to sell part of the residuary realty.

One of the requisitions delivered by the purchasers was as follows: "It appears that the property, as forming part of the residuary estate of William Bettell, is still, notwithstanding the order of December 3, 1909, subject to and charged with the annuities and legacies given by the will of the said William Bettell. The property must be effectually released from these charges."

To this the vendors, in reply, said that, having regard to the terms of the order, the annuitants and legatees could have no claim on the property thereby directed to be transferred to the vendors.

The purchasers insisted on their objection, and the vendors

accordingly took out an originating summons asking for a declaration that the requisitions and objections on title had been sufficiently answered, and that a good title had been shewn by the vendors.

J. G. Wood, for the vendors. The Court clearly has jurisdiction to set apart a sufficient sum to answer annuities and pay the residue to the residuary legatees: *Harbin* v. *Masterman*. (1) The effect of the order of December 3, 1909, is that the residue is freed from liability for annuities or legacies, and the only rights of the annuitants and legatees are against the fund set aside for their benefit.

W. M. Cann, for the purchasers. The purchasers are willing to complete if they can be protected from claims by the annuitants or legatees. But such protection can only be obtained by means of an order under s. 5 of the Conveyancing and Law of Property Act, 1881, which provides (sub-s. 1) that "where land subject to any incumbrance, whether immediately payable or not, is sold by the Court, or out of Court, the Court may, if it thinks fit, on the application of any party to the sale, direct or allow payment into Court, in case of an annual sum charged on the land, or of a capital sum charged on a determinable interest in the land, of such amount as, when invested in Government securities, the Court considers will be sufficient, by means of the dividends thereof, to keep down or otherwise provide for that charge, and in any other case of capital money charged on the land, of the amount sufficient to meet the incumbrance and any interest due thereon . . . ."; and (sub-s. 2) "thereupon, the Court may, if it thinks fit, and either after or without any notice to the incumbrancer, as the Court thinks fit, declare the land to be freed from the incumbrance, and make any order for conveyance, or vesting order, proper for giving effect to the sale, and give directions for the retention and investment of the money in Court."

As no order under the Act has been obtained, the residuary estate is still subject to the charge, and the legatees and annuitants may, if necessary, resort to it: *In re Parry*. (2)

When annuities are made payable out of the income of a fund

(1) [1896] 1 Ch. 351. (2) (1889) 42 Ch. D. 570, 584.

PARKER J. 1910 — EVANS AND BETTELL'S CONTRACT, *In re.*

which is bequeathed subject to them, they are a charge on the corpus: *In re Howarth.* (1)

J. G. Wood in reply.

PARKER J. In my judgment, the events which have happened have not exonerated the real estate comprised in the will from the charge thereby created in favour of annuitants and persons who, in certain future and contingent events, become entitled to legacies.

The jurisdiction of the Court, exercised in *In re Parry* (2) and in *Harbin* v. *Masterman* (3), is, in my judgment, a jurisdiction founded on administration only. When an annuity is charged on the income of residuary real and personal estate, and the personal estate is amply sufficient to provide for all the rights of the annuitants, the Court, in the exercise of its administration jurisdiction, sets aside a fund and distributes the rest of the estate. But, as North J. points out in *In re Parry* (2), that exercise of jurisdiction does not release the rest of the estate; and if the fund fails, owing to unforeseen circumstances, to answer the annuity, the annuitant may follow the rest of the property into the hands of those entitled to it, since it is still subject to the annuity. I am not sure that the jurisdiction has ever been exercised, or could well be exercised, with regard to real estate.

In the present case the residuary estate consists of personalty invested in securities and of real estate. There is no trust for sale, and, subject to the annuities and legacies, the residue belongs to the residuary devisees and legatees under the will. The residuary personalty is amply sufficient to pay the legacies and annuities, and the Court, in the exercise of its jurisdiction, has set aside a fund to answer them, and has directed the transfer and payment of the residuary estate to the parties entitled to it.

Some of the realty has been put up for sale, and the purchasers have taken the objection that a good title has not been shewn, since the realty is still subject to and charged with the annuities

(1) [1909] 2 Ch. 19. (2) 42 Ch. D. 570.
(3) [1896] 1 Ch. 351.

and legacies given by the will. In my judgment, that contention is correct, and there has been nothing to release the property from them.

But the difficulty may be got over if the purchase-money is paid into Court in the administration action, and an application is made in that action for an order under s. 5 of the Conveyancing and Law of Property Act, 1881, whereby the Court can declare the property freed from the charge. It will be best to give the vendors an opportunity of making such an application in order to see what can be done.

The summons was dismissed with costs, his Lordship, by consent, giving the purchasers liberty to apply for further relief in case the vendors should fail to obtain the release of the property from the charge.

Solicitors for the vendors: *Corbin, Greener & Cook, for R. A. Wilkinson, Barnsley.*

Solicitors for the purchasers: *Horsley & Weightman.*

F. E.

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1910
July 15.

In re POYSER.
LANDON *v.* POYSER.

[1910 P. 899.]

Settled Estate — Tenant for Life and Remainderman — Residue — Testator's Liabilities—Annuity—Contingent Liability—Capital and Income—Apportionment—Past and future Instalments—Interest.

J. T. Poyser by his will left his residuary real and personal estate to trustees upon trust for sale and conversion and to pay debts and legacies, and then for his eight children, of whom one was to have one fifteenth and the others two fifteenths each, and he settled all the shares wholly or partially upon trust for the son or daughter for life with remainders over. By a settlement made on the marriage of one of his sons before the date of his will the testator had covenanted to pay to that son an annuity of 250*l.* a year. The testator died in 1901, leaving a very large estate. His widow and all his children were living, and owing to a mistaken view of the construction of the will the son's annuity had not been paid. The trustees had sufficient funds, representing capital, in hand to pay the arrears, but a question was raised whether, as between the tenants for life and remaindermen of the settled shares, part of the burden of paying the past and future instalments of the annuity ought not to be borne by the tenants for life :—

Held (following *In re Perkins*, [1907] 2 Ch. 596), that each instalment of the annuity must be apportioned between capital and income by calculating what sum if set aside at the testator's death would, with simple interest at 3½ per cent. to the day of payment, have met the particular instalment ; and that the sum so ascertained ought to be chargeable to capital and the balance to income, having regard to the number of shares into which the estate was divisible.

Josiah Thomas Poyser by his will, dated March 27, 1901, after appointing executors and trustees and making certain specific devises and bequests, devised and bequeathed the residue of his real and personal estate to his trustees upon trust to sell and convert and out of the money to arise from such sale and conversion to pay his funeral and testamentary expenses and debts and the legacies and annuities thereby given. The testator left five sons and three daughters, and he directed that, subject to certain annuities, his residuary estate should be divided amongst them in such proportions that one son, Henry Crisp Poyser, should have one fifteenth and that the other children should each have two fifteenths, and the testator

settled all the daughters' shares and H. C. Poyser's share and half the other sons' shares upon trust for the son or daughter for life with remainders over. The testator declared that it should be lawful for his trustees to postpone sale and conversion and (by clause 38) that until all his real and personal estate should have been sold the rents and profits and income of the particulars for the time being composing the same, after payment of outgoings, should be paid and applied to the persons for the purposes and in the manner to whom and for and in which the income of the stocks, funds, and securities in or upon which the moneys to arise from the sale thereof were thereinbefore directed to be invested would be payable or applicable under the trusts therein contained in case the sale and investment aforesaid were then actually made, and that the several persons for the time being entitled for life or otherwise to the income of the ultimate residue of his estate or of any share therein should be considered entitled to such income from the day of his death, and that no part of such income should be added to capital.

By the settlement made on the marriage of John Crisp Poyser, one of the testator's sons, in May, 1900, the testator had covenanted with trustees that if the marriage took place he, his executors or administrators, would pay to them during the joint lives of himself and his wife and the survivor of them and so long as J. C. Poyser or his wife or any of their issue should be living the yearly sum of 250*l.*, commencing from the marriage, to be applied by them in the same manner as the income of a sum of 10,000*l.* thereinafter mentioned; and the testator further covenanted to pay to the trustees 10,000*l.*, and it was declared that they should pay the income thereof to J. C. Poyser for life subject to forfeiture in certain events with remainders over.

The testator died on May 10, 1901, leaving a very large estate. His widow and all his eight children were still alive, but the estate had proved difficult to realize and had not yet been divided. Various applications to the Court had been necessary, one of which is reported, namely, *In re Poyser*, *Landon* v. *Poyser*. (1) On May 6, 1908, Warrington J. made an order declaring that the trustees of J. C. Poyser's settlement were entitled to receive

(1) [1908] 1 Ch. 828.

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the annuity of 250*l.* as well as the 10,000*l.*, and that the payments of that annuity ought, for the purposes of the division of the estate, to be treated as a debt payable out of the capital of the testator's estate. Before that order it had been supposed that J. C. Poyser was not entitled to receive his annuity and also the income from his share in the testator's estate, and consequently the annuity had not been paid to his trustees. He was now entitled to a considerable sum for arrears, and the trustees of the will had in hand sufficient funds representing capital to pay them off; but a question had been raised whether, as between the tenants for life and remaindermen of the settled shares, some part of the burden ought not to be thrown directly on the tenants for life.

The trustees took out this summons to determine (1.) the question whether the instalments of the annuity ought to be paid wholly out of capital or partly out of income, and, in the latter case, whether (2.) the proportionate amounts ought to be ascertained (*a*) by a separate actuarial valuation of the life interest and reversionary interest respectively in each settled share or part of a share as at the testator's death or at some other and what date and an apportionment of the sum payable towards such instalment as between the income and capital of each such share or part of a share, in proportion to the relative values so arrived at, or (*b*) on the footing that each instalment ought to be treated separately by ascertaining on the occasion of each instalment becoming payable what sum if set aside at the testator's death and accumulated at 4 per cent. per annum simple interest or some other and what rate would equal the amount of that instalment, and paying so much of that sum as (having regard to the number of shares into which the testator's estate was divisible) each settled share or part of a share ought to bear out of the capital thereof, and the residue of the sum payable towards the instalment in question out of the income thereof, or (*c*) in some other and what manner; (3.) whether the arrears of the annuity ought as between tenant for life and remainderman to be treated and paid on the same footing as the instalments above referred to; (4.) costs; (5.) if and so far as necessary, administration.

J. K. Young, for the plaintiffs, referred to *In re Thompson*. (1)

E. A. Jennings, for a tenant for life. Each instalment of the annuity is a debt owing by the testator's estate and ought to be paid out of capital, so that the tenant for life loses the income of the part which is taken away. At present the instalments are contingent on the annuitant being alive; they may ripen into debts, and when they become debts they will be payable out of capital as they arise. We are tenants for life of residue and entitled to the income of every part of the estate that is not wanted for payment of debts. The rule in *Allhusen* v. *Whittell* (2) does not apply to the case of a contingent debt, and it is inconvenient and expensive. The tenant for life's income ought not to be diminished now for the purpose of providing for payments which may never become payable: *In re Bacon* (3); *In re Henry*. (4) It is true that in *In re Dawson* (5) and *In re Perkins* (6) those two cases were not followed and the rule in *Allhusen* v. *Whittell* (2) was adhered to, but we submit that the real distinction between that case and the present is the fact that these debts are only contingent and the estate is ample. The reasoning of the decisions in *In re Dawson* (5) and *In re Perkins* (6) does not apply where the estate is sufficient.

[PARKER J. I do not think that the fact that the debt is contingent makes any distinction. The real difference is that between specific legacies and residuary gifts, and this seems to have been lost sight of in *In re Bacon* (3) and *In re Henry*. (4) There is no definite fund to which you can say you are entitled.]

That is because the debt is contingent. [He also referred to *In re Muffett* (7), *In re Harrison* (8), and *Fletcher* v. *Stevenson*. (9)]

L. W. Byrne, for another tenant for life, supported the same contention, and submitted that on the construction of the will the rule in *Allhusen* v. *Whittell* (2) did not apply.

T. B. Napier, for remaindermen, was stopped by the Court.

(1) [1908] W. N. 195.
(2) (1867) L. R. 4 Eq. 295.
(3) (1893) 62 L. J. (Ch.) 445.
(4) [1907] 1 Ch. 30.
(5) [1906] 2 Ch. 211.
(6) [1907] 2 Ch. 596.
(7) (1888) 39 Ch. D. 534.
(8) (1889) 43 Ch. D. 55.
(9) (1844) 3 Hare, 360.

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PARKER J. It appears to me that this being a case of residue the principle of *Allhusen* v. *Whittell* (1) is applicable and that the decisions of Swinfen Eady J. in *In re Dawson* (2) and *In re Perkins* (3) are to be preferred to those of Kekewich J. in *In re Bacon* (4) and *In re Henry*. (5) I also agree with Swinfen Eady J. that when it is determined that there shall be some apportionment as between tenant for life and remainderman the method of carrying that out is in the discretion of the Court; and in the exercise of that discretion I consider that his exercise of it in *In re Perkins* (3) is preferable to that in *In re Dawson* (2) and should be adopted. I observe that in *In re Thompson* (6) Joyce J. came to the same conclusion. The order will therefore be in the form adopted in *In re Perkins* (3), and interest will be at 3½ per cent.

The minutes of the order provided as follows:—

Declare that as between the tenant for life and the persons entitled in remainder to each settled share or settled part of a share in the testator's estate a proportionate part (regard being had to the number of shares in which the testator's estate is divisible) of each instalment of the annual sum of 250*l.* covenanted to be paid by the testator by the indenture of the 21st May 1900 so long as such sum continues to be payable ought to be borne by and out of the income and capital respectively of each such settled share or settled part of a share on the footing of ascertaining what sum if set aside at the testator's death and added to simple interest on that sum calculated at the rate of 3*l.* 10*s.* per cent. per annum as from the same date to the date when such instalment becomes payable will equal the amount of that instalment and paying in account a proportionate part of that sum out of or against capital and a proportionate part of the residue of the instalment in question out of or against income (regard being had in either case in fixing the proportionate part to the number of shares into which the testator's estate is divisible).

Declare that the arrears of the said annuity since the testator's death and any payments made since such death in respect of the said annuity ought to be paid or adjusted on the footing of the foregoing declaration.

Solicitors: *E. F. & H. Landon; Rawle, Johnstone & Co.; Gibson & Weldon, for Watson & Everitt, Norwich.*

(1) L. R. 4 Eq. 295.
(2) [1906] 2 Ch. 211.
(3) [1907] 2 Ch. 596.
(4) 62 L. J. (Ch.) 445.
(5) [1907] 1 Ch. 30.
(6) [1908] W. N. 195.

H. C. R.

MERRICK *v.* LIVERPOOL CORPORATION.

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Jan. 27, 29; *July* 21, 22, 25, 29.

[LIVERPOOL DISTRICT REGISTRY.]

[1909 M. 2530.]

Local Government—Special Act—Liverpool Sanitary Amendment Act, 1864 (27 & 28 *Vict. c. lxxiii.*)—*Public Health—Demolition of Buildings—"Court"—Public Authorities Protection Act*, 1893 (56 & 57 *Vict. c.* 61), *s.* 1 (*a*)—*Jurisdiction—Injunction—Proceedings before Justices.*

The plaintiff was the owner of No. 6 Court, Great Homer Street, Liverpool, containing on one side six houses with odd numbers and on the other side six houses with even numbers. In 1904 the grand jury presented by presentment "A" that No. 6 Court, and by presentment "B" that the six houses with odd numbers, were unfit for human habitation and ought to be demolished. Copies of the presentments were served on the plaintiff together with notices referring to s. 23 of the Liverpool Sanitary Amendment Act, 1864, which provided that the owner should within three months take down the premises, and that in default the corporation should take them down and in either case should pay compensation. The plaintiff elected to retain the site of the court and of the odd numbered houses, and compensation was paid to her in respect of the six houses, which were subsequently demolished. In March, 1909, notices were served on the plaintiff under ss. 32 to 34 (which make no provision for compensation) of the Housing of the Working Classes Act, 1890, in respect of the six houses with even numbers, and summonses for closing orders in respect of each house were issued. The plaintiff then commenced this action for (1.) a mandamus commanding the defendants to take down No. 6 Court pursuant to the provisions of the Act of 1864, and to have compensation assessed, on the ground that presentment "A" extended to the whole court and all the houses therein, and that the defendants had been guilty of statutory neglect in not taking down all the houses, and (2.) an injunction to restrain the defendants from proceeding with the applications for closing orders before the magistrates on the ground that the demolition was really part of a scheme for reconstruction or ventilation projected by the defendants which ought to be dealt with under the parts of the Act of 1890 entitling the plaintiff to compensation, and not under ss. 32 to 34:—

Held, that under the Act of 1864 the word "court" meant the passage or place on to which the houses opened, and did not extend to include also the houses themselves, and that the plaintiff's claim to a mandamus failed.

Even if the plaintiff's interpretation of the word "court" had been correct, s. 1 (*a*) of the Public Authorities Protection Act, 1893, would have been a complete answer to her claim, inasmuch as she had elected to accept the status quo in preference to enforcing her statutory rights.

Held, also, that there were no special circumstances to warrant

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interference with the proceedings before the magistrates, and that the claim for an injunction must be refused.

Grand Junction Waterworks Co. v. *Hampton Urban Council*, [1898] 2 Ch. 331, followed.

WITNESS ACTION.

The following statement of facts is taken from his Lordship's judgment:—

"The plaintiff is the owner of a copyhold tenement known as No. 6 Court, Great Homer Street, in the city of Liverpool. Great Homer Street lies north and south, and the court, which is one of five contiguous courts distinguished by the numbers 2, 4, 6, 8, and 10, runs approximately at a right angle to the street. It is a cul-de-sac, terminating in a wall at the east end, and, prior to a partial demolition which took place in 1905, it consisted of a flagged courtyard some 100 ft. in length, and of a width for the most part of some 17 ft. On each side of this courtyard there was a row of six three-storey houses, those on the north side being numbered 1, 3, 5, 7, 9, and 11, and those on the south side 2, 4, 6, 8, 10, and 12. On each side of the entrance to the court from Great Homer Street was a house fronting on to that street. No question arises in this case with reference to these two houses, which are known as Nos. 88 and 90, Great Homer Street, and in this litigation the court has been treated throughout as referring only to the premises in the rear of these houses.

"In 1864 the Liverpool Sanitary Amendment Act (27 & 28 Vict. c.. lxxiii.) of that year was passed. The following recital indicates some of the main purposes for which the Act was passed:—'And whereas there are in the borough a great number of houses situated in, or abutting upon, or contiguous to, or at the entrance of courts and alleys, which houses, by reason of defects in the construction thereof, or of the want of ventilation or of proper conveniences, or from other causes, are unfit for human habitation, and fevers and other diseases are constantly generated there, causing death or loss of health not only in the courts and alleys, but also in other parts of the borough; and it is expedient that provision be made for the remedy thereof, and also that further provision be

made for the regulation of future courts and alleys in the said borough, and of the houses and buildings to be erected therein.' The Act has been amended by later statutory enactments, the principal of which are to be found in, first, the Liverpool Improvement Act, 1867; secondly, the Liverpool Improvement and Waterworks Act, 1871; thirdly, a provisional order of the Local Government Board dated May 2, 1879, and confirmed by an Act of the same year; fourthly, the Liverpool Improvement Act, 1882; and, fifthly, the Liverpool Corporation Act, 1902.

"On May 16, 1904, the corporation, in pursuance of the powers conferred upon them by the foregoing enactments, or some of them, served upon the plaintiff's agents notice that in accordance with the Act of 1864 a report had been made by the medical officer of health respecting certain alleys and premises therein specified in order that the same might be laid before the grand jury at quarter sessions to the end that such further proceedings might be taken therein as in and by the said Act are in that behalf directed. Attached to the said notice is a copy of the medical officer's report, whereby he finds and reports that the several courts, alleys, and premises thereafter named are respectively unfit for human habitation, and in a condition, state, and situation injurious, dangerous, and prejudicial to health, and that the powers of the Act ought to be put in force in respect to such courts, alleys, and premises respectively, and that the said several courts, alleys, and premises ought to be demolished. Included in the courts, alleys, and premises is the plaintiff's property, which is reported upon in these terms at page 6 of the Exhibit E. R. P. 1: 'The court known as No. 6 Court in Great Homer Street in the city of Liverpool. The dwelling-houses numbered 1, 3, 5, 7, 9 and 11 in the said No. 6 Court.'

"On June 6, 1904, the report was taken into consideration by the grand jury, and after hearing evidence and arguments, and viewing the property, they made two presentments, the one relating to the court and the other to the six houses on the north side numbered 1, 3, 5, 7, 9, and 11. Notices of these presentments were served on the plaintiff's agents on July 12 and are the Exhibits J. D. C. 5 and J. D. C. 6. I will read one of such notices. It is distinguished by the letter 'A' printed in red

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ink, and is headed 'Court. 18th Presentment.' It is also headed 'City of Liverpool,' and in the matter of the various Acts and provisional orders. It reads: 'Pursuant to the provisions of the Liverpool Sanitary Amendment Act, 1864, I, the undersigned, Edward Ralph Pickmere, Town Clerk of the city of Liverpool, do hereby give you notice that the grand jury of the Court of quarter sessions of the said city, held on the eighth day of June, one thousand nine hundred and four, made a presentment in pursuance of the said Acts, a true copy of which is subjoined. And as the presentment of the grand jury involves the total demolition of the property, I hereby give you further notice that by section 23 of the Liverpool Sanitary Amendment Act, 1864, as amended by section 58 of the Liverpool Corporation Act, 1902, it is provided that the owner shall within three months after notice of the presentment proceed to take down and remove the premises, and if such owner fail therein the corporation shall proceed to take down and remove the same, and in either case the corporation shall pay compensation for the damage which may be sustained by such taking down and removal, including the value of the site thereof (unless the owner shall desire to retain the site thereof), provided that the owner shall not be entitled to retain the site of the said premises unless he shall have given written notice to the corporation of his desire or intention to retain the same within three months after notice of the presentment. And I do hereby inform you that Mr. Thomas Shelmerdine, the land steward and surveyor of the said city, has prepared a plan and specification of such works as are required in reference to such presentment, and that such plan and specification may, if you think fit, be inspected and transcribed by you or your agent, at the office of the land steward and surveyor, Municipal Offices, Dale Street in the said city, without charge. Dated this twelfth day of July, one thousand nine hundred and four'; then it is addressed to the agents 'and to all and every person or persons whom it may concern.' The presentment at the foot is: 'City of Liverpool, to wit: The jurors of our Lord the King upon their oath present that a certain court within the city of Liverpool, known or designated as Number 6 Court, in Great Homer Street, in the said

city, and specified in the report of the medical officer of health for the said city, dated the 29th day of March, 1904, is unfit for human habitation, and in a condition, state, and situation injurious, dangerous, and prejudicial to health, and ought to be demolished, in pursuance of "The Liverpool Sanitary Amendment Act, 1864." ' The other notice differs from the one I have read in these respects: it is distinguished by the letter 'B' printed in red ink, is headed 'Houses in Court,' and the presentment deals with the dwelling-houses known as 1, 3, 5, 7, 9, and 11 in Court No. 6, and not with the court itself.

"The plan and specification referred to in those notices are contained in the Exhibit E. R. P. 1. The specification is headed 'Specification of works required to be done in the demolition of premises included in the 18th presentment, and the structural work thereby rendered necessary to the adjoining property,' and then follow under eight separate heads particulars of the work which is required to be done. In the schedule to that specification at pages 14 and 15, under distinguishing numbers, are included the six houses bearing odd numbers in Court No. 6 in Great Homer Street, and the plan which is numbered 3 in this exhibit shews the houses which are intended to be demolished as the houses with the odd numbers on the north side of the court.

"The plaintiff appealed against the presentment, and her appeal was on December 7, 1904, dismissed by the recorder, then Mr., now Mr. Justice, Pickford. After the dismissal of the appeal, negotiations took place between the plaintiff's advisers and the corporation with a view to fixing the compensation to be paid to the plaintiff, and in the course of such negotiations a suggestion was made on the plaintiff's behalf that the corporation might make an offer for the entire property in lieu of paying compensation for that part of it which was then about to be demolished. In answer to this suggestion it was intimated that the corporation would not themselves make any offer, and, indeed, were considering whether a report ought not to be obtained with a view to the other houses in the court being presented to the grand jury at the next presentment.

"The negotiations came to nothing, and, as the parties took widely different views on the question of compensation, the

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plaintiff on February 27, 1905, elected to retain the site of the court and the odd numbered houses therein, and the compensation payable to her by the corporation on this footing in respect of the six houses was on May 27, 1905, assessed by Mr. Askwith, the arbitrator appointed for the purpose by the Local Government Board, at 375*l*. The houses were demolished in due course, and on November 9, 1905, the compensation was paid to the plaintiff. And so matters rested until late in 1908, or early in 1909, when the corporation decided, if practicable, to bring about the closing of the plaintiff's other six houses in the court under statutory power, the exercise of which would not involve them in the payment to her of compensation. When this attitude of the corporation was made apparent to the plaintiff, it was then for the first time contended on her behalf that by presenting the court in 1904 the grand jury had made a presentment involving the total demolition of all the twelve houses therein, and that as from October 12, 1904, that is, from the expiry of three months after notice of the presentment was served on her agents, the corporation have been under a statutory obligation to take down and remove not only the six odd numbered houses, the subject of the contemporaneous presentment, but also the six even numbered houses on the other side of the court, and to pay her compensation for the taking down and removal of such last-mentioned houses. This contention being repudiated by the corporation, the plaintiff's first claim in this action is 'for a mandamus commanding the defendants to take down and remove the court No. 6 Great Homer Street in the city of Liverpool pursuant to the provisions of the Liverpool Sanitary Amendment Act, 1864, and take all proper steps for the assessment of the compensation payable to the plaintiff for the damage which may be sustained by such taking down and removal, including the value of the premises (except the site thereof) and including compensation for all damage occasioned to the plaintiff by reason of the rebuilding of the said site being subject to the consent of the defendants.'"

His Lordship stated the further facts relative to the proceedings taken by the defendants in 1909 as follows:—

"In March, 1909, the medical officer of health reported to

the Housing Committee of the corporation on the condition of the even numbered houses in Court No. 6, and thereupon it was resolved that the committee were of opinion that the houses 'are in a state so dangerous or injurious to health as to be unfit for human habitation and are in such a state that the occupation thereof should be immediately discontinued and are not reasonably capable of being made fit for human habitation,' and directed that the necessary proceedings be taken by the chief inspector of nuisances or by the deputy inspector under the Housing of the Working Classes Acts, 1890 to 1903, to obtain a closing order on the occupiers and owners. Following upon that resolution a notice in respect of each house was served upon the plaintiff's agents requiring them within fourteen days to make the premises mentioned therein fit for human habitation, and intimating that if default was made in complying with such requisition proceedings would be taken before a Court of summary jurisdiction for prohibiting the use of the premises for human habitation.

"The requisition not having been complied with, six summonses were on October 4 issued for the purpose of obtaining a closing order in respect of each of the said houses under the provisions of the Housing of the Working Classes Acts, 1890 to 1903. The summonses, which in the first instance were addressed to the plaintiff's agents, were subsequently amended by being addressed to the plaintiff. They stood over from time to time, and on December 8 the plaintiff issued the writ in this action, whereby, as an ancillary and alternative relief to the mandamus, she claims 'an injunction to restrain the defendants from making or proceeding with any application to a Court of summary jurisdiction for closing orders in respect of any of the houses in the said court.'"

The result of the evidence at the trial appears in his Lordship's judgment.

P. O. Lawrence, K.C., and *W. D. MacConkey*, for the plaintiff. We submit that all the houses upon the plaintiff's property No. 6 Court, Great Homer Street, were included in the medical officer's report of March 16, 1904, and in presentment

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"A," which refers only to "No. 6 Court," and that s. 32 of the Housing of the Working Classes Act, 1890, does not apply. Under presentment "A" the defendants should themselves have removed the buildings under s. 23 of the Liverpool Sanitary Amendment Act, 1864, upon the plaintiff's failing to remove them within the specified time. They did not do so, and thereby there has been a continuance of injury or damage to the plaintiff which takes the case out of s. 1 (*a*) of the Public Authorities Protection Act, 1893.

No proper notice was served upon the plaintiff in 1909 of the resolutions and proceedings relating to the closing orders. The notice was bad and irregular within the decision of *Wirral Rural Council* v. *Carter*. (1) The resolutions of the committee, moreover, were not passed bona fide, and the closing orders thereby directed were an attempt by the defendants to carry out the scheme imposed by the Housing of the Working Classes Act, 1890, without payment of compensation and were an abuse of the statutory powers.

The Court has jurisdiction to restrain proceedings where irregularity has occurred or where it is just and convenient so to do: *Hedley* v. *Bates*. (2)

H. Courthope-Munroe and *Roger B. Lawrence*, for the defendants. The two presentments must be read together, and a reasonable construction and interpretation put upon both. It was never intended that the words "No. 6 Court" in presentment "A" should refer to the whole court and all the houses, but to the space outside the houses, and presentment "B" indicated the houses, namely, those with odd numbers.

Where a special tribunal has been pointed out by the authorities the Court will not interfere by injunction or declaration unless in very special circumstances, but will leave the party aggrieved to the remedy pointed out by the Act of Parliament: *Lord Auckland* v. *Westminster Local Board of Works* (3); *Kerr* v. *Preston Corporation* (4); *Stannard* v. *Vestry of St. Giles, Camberwell* (5); and the more recent case of *Grand Junction*

(1) [1903] 1 K. B. 646.
(2) (1880) 13 Ch. D. 498.
(3) (1872) L. R. 7 Ch. 597.
(4) (1876) 6 Ch. D. 463.
(5) (1882) 20 Ch. D. 190.

Waterworks Co. v. *Hampton Urban Council* (1), where the earlier decisions were examined and the whole question of jurisdiction carefully considered by Stirling J. There are no such special circumstances in the present case. The plaintiff cannot raise any objection on the ground of irregularity with respect to the summonses, which were amended with her consent: *Rex* v. *Tabrum*. (2)

Sect. 1 (*a*) of the Public Authorities Protection Act, 1893, affords the defendants a complete answer. The words relied upon are "or in respect of any alleged neglect or default in the execution of any such Act, duty or authority." The plaintiff had a reasonable time in which to pull down the buildings. She did not do it, but she has suffered no injury or damage by the defendants having let the building stop up. She was in receipt of the rents all the time and was suffering no injury at all, and certainly no continuing injury.

P. O. Lawrence, K.C., in reply. First, on the question of mandamus, the Court cannot now go behind presentment "A," which was for the demolition of every house in the "court," which word must refer to all the houses and not to the mere space or paved yard. It means all the houses in the yard, to the whole of which the provisions of s. 23 are applicable. No satisfactory explanation of the two presentments "A" and "B" is forthcoming.

There is no authority for saying that because the plaintiff is not suffering damage there is no case for a mandamus, and there has been nothing to disentitle the plaintiff to a mandamus.

In the present case there has been a continuing injury by the defendants in their not having paid compensation, and s. 1 (*a*) of the Public Authorities Protection Act, 1893, does not apply.

Then with regard to the claim for an injunction, we submit that this is one of that class of cases of which *Lord Auckland* v. *Westminster Local Board of Works* (3) is an example, and that the magistrates are not the proper tribunal to go into the questions raised. They have no jurisdiction because there was no proper notice: *Hedley* v. *Bates* (4), where it was pointed out

(1) [1898] 2 Ch. 331.
(2) (1907) 71 J. P. 325.
(3) L. R. 7 Ch. 597.
(4) 13 Ch. D. 498.

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that that went to the root of the jurisdiction of the magistrates. If it is not a proper case for the magistrates it is all the more a case for the High Court.

The evidence clearly shews that this was part of a scheme for obtaining ventilation without having to pay compensation, and that these houses were not unfit for human habitation or insanitary, and I ask the Court to find that they were not the proper subjects for closing orders and demolition. I submit that the proper course was for the defendants to proceed under Part I. of the Act or under ss. 38 or 39 of Part II. of the Act of 1890 and pay reasonable compensation.

Cur. adv. vult.

July 29. EVE J. stated the facts above set out, and continued:—The plaintiff's first claim in this action is for a mandamus. [His Lordship read the claim.] This claim of the plaintiff, which, having regard to all that took place in 1904 and 1905, is, to say the least, rather startling, is based upon the construction which she seeks to put upon the Act of 1864. She contends that the word "court" in the Act and in the presentment means the paved courtyard and the houses entered therefrom; that when the jury in 1904 presented that "the court" ought to be demolished, they in effect presented that all the twelve houses opening on to the courtyard ought to be demolished, and, seeing that the requirements of the presentment involved total demolition, s. 23 of the Act immediately became applicable. That section, so far as is material, is as follows: "If the requirements of the presentment shall involve the total demolition and not the improvement of the premises specified therein, the owner shall, within three months after notice of the presentment, proceed to take down and remove the premises, and if such owner fail therein, then the corporation shall proceed to take down and remove the same: and in either case the corporation shall pay compensation for the damage which may be sustained by such taking down and removal, including the value of the premises and the site thereof (unless the owner shall desire to retain the site, subject to the provisions of this Act with reference to the use thereof)." Before turning to the definition of the word "court"

in the Act, I cannot forbear pointing out, if the word bears the meaning in the presentment for which the plaintiff contends, how unnecessary and futile was the presentment of even date whereby six only of the houses in the court were presented for demolition contemporaneously with the presentment involving the demolition of all the twelve houses. If the matter rested on the construction of the presentments alone, I do not think any tribunal could come to any other conclusion than that the two must be construed together, and so construed as to give a reasonable interpretation to both, and such interpretation would, in my opinion, limit the operation of presentment "A" to the courtyard and any erections or appliances existing therein, such as the closets and standpipes which are to be found in this very court. But I think the plaintiff's counsel are right in saying that the matter cannot be disposed of on the construction of the presentments alone, and that regard must be had primarily to the definition of the word "court" in the Act. This is to be found in s. 3, which, so far as is material, and as corrected by the provisional order of 1879, reads as follows: "The word 'court' and the word 'alley' means and includes any court, alley, street, lane, highway, road, thoroughfare, passage or place having the principal or only entrance of any house therein, and not being a carriage-way, or, if a carriage-way, having the entrance thereto less than 40 ft. in width."

Now I agree that the use of the word "therein" in that paragraph introduces an element of doubt upon the point whether the words "court" and "alley" are limited to the place outside the houses, but I think the doubt is dispelled by the words which immediately follow, "and not being a carriage-way." These expressions seem to me to indicate the kind of subject-matter which the Legislature treated as being within the definition, and I think I should be putting a strained construction on the word if I were to hold it as extending to all the houses opening on to the same street, lane, road, thoroughfare, passage or place. I think it means the passage or place on to which the house or houses open, and that the word "premises" is the word used in the Act when such houses are intended to be referred to. See, for example, s. 5, where the expression

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"premises in the court or alley" is tautological if "court or alley" means the courtyard and the houses situate therein.

This conclusion disposes of the plaintiff's claim to the mandamus, but I desire to add that had I accepted the plaintiff's construction I should have felt great hesitation, after all that has happened, and the attitude which the plaintiff has adopted, in making any order, and, further, that in my opinion the Public Authorities Protection Act of 1893 would have afforded a complete answer to the claim. The cause of action accrued on October 12, 1904, or within a reasonable time thereafter, and I do not think the facts that the statutory neglect has continued to the present time and that it has been to the plaintiff's advantage to refrain from enforcing the statutory obligation could legitimately be regarded as operating to prevent the application of the statute. In such circumstances the plaintiff must be treated as having elected to accept the status quo in preference to enforcing her statutory right, and must put up with the consequences flowing from such election.

The conclusion at which I have now arrived brings me to the consideration of the plaintiff's alternative claim for an injunction.

The principles by which the Court is guided in determining whether it ought to interfere to restrain proceedings before a magistrate are clearly stated by Stirling J. in the case of *Grand Junction Waterworks Co.* v. *Hampton Urban Council.* (1) The head-note is this: "The Court will not interfere by way of injunction or declaration of right where the Legislature has pointed out a mode of procedure before a magistrate; unless (it seems) in very special circumstances. *Lord Auckland* v. *Westminster Board of Works* (2), *Kerr* v. *Preston Corporation* (3), and *Stannard* v. *Vestry of St. Giles, Camberwell* (4) considered"; and the learned judge, after examining exhaustively the authorities there referred to, proceeds (5): "Now that being the state of the authorities, I do not think it would be right for me to say that there is absolutely no jurisdiction in the Court to restrain proceedings before the magistrate. In this case, as in the case

(1) [1898] 2 Ch. 331.
(2) L. R. 7 Ch. 597.
(3) 6 Ch. D. 463.
(4) 20 Ch. D. 190.
(5) [1898] 2 Ch. 344, 345.

of *Stannard* v. *Vestry of St. Giles, Camberwell* (1), there is no evidence, indeed there is no allegation in the statement of claim, that the defendants threaten or intend to enter upon the plaintiffs' lands in any way; and it was admitted by the plaintiffs' counsel that the allegations in that respect could not be improved or added to. They simply shew an intention to proceed before the magistrates, as indeed is also shewn by the correspondence to which I have called attention. There is, therefore, no ground for the interference of the Court upon the footing that the defendants threaten or intend to do any illegal act. All that it is shewn they threaten or intend to do, and that which they have done, is to proceed before the magistrates in the way which is pointed out by s. 3 of the statute. Now, whether or no there be jurisdiction in the Court to restrain by injunction such an application, it seems to me that the granting of an injunction in such a case is a matter which ought to be done with the greatest possible caution, and I respectfully adopt the language of the Master of the Rolls in that case." Then quoting from the Master of the Rolls, he says: "Where the Legislature has pointed out a mode of proceeding before a magistrate it is not, as a general rule, for another Court to interfere to stop that proceeding by injunction." Then he resumes: "I desire to add that in contests between local authorities and private owners it seems to me that that rule ought to be adhered to somewhat strictly. In these matters as to building lines the Legislature has provided a cheap and short mode of obtaining a decision on the point in question, and it would be a matter of regret if a different and more expensive mode of obtaining a decision were to be habitually resorted to, or resorted to in the absence of very special circumstances. I confess my own experience, sitting here as a judge, leads me to believe that vestries and other local authorities are sometimes too ready to embark in costly litigation without any equivalent benefit to the public or the ratepayers whom they represent; and I should be sorry if either private individuals or public authorities were, when a cheap and speedy mode of settling a dispute is provided by the Legislature, to resort to a more expensive

(1) 20 Ch. D. 190.

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one. I think, therefore, that, in the exercise of the discretion which is vested in the Court, it ought, even as regards the granting of an injunction, to be very slow to grant an injunction against taking proceedings before the magistrate when the Legislature has pointed out that as the proper mode of proceeding."

Now, what are the special circumstances upon which the plaintiff in this case relies as affording sufficient ground for the intervention of this Court? Apart from an alleged irregularity in the service of the notices leading up to the summonses, which it is admitted would not of itself justify an application to restrain the police court proceedings, the plaintiff's claim is based on the allegation that the action of the corporation, although ostensibly and in form directed to the demolition under ss. 30 to 34 of the Housing of the Working Classes Act, 1890, of the six houses as unfit for human habitation, is really and in substance one step or proceeding in a scheme of reconstruction which ought to be dealt with, not under the sections I have just referred to, but either under Part I. of the Act or under ss. 38 and 39 of Part II. thereof, the importance of the distinction lying in this, that demolition under the pending procedure involves the corporation in no liability to pay compensation to the plaintiff, whereas proceedings by any of the alternative methods would give rise to a claim by the plaintiff for compensation. The corporation do not deny that they desire and intend if it be practicable to improve the sanitary condition of this and other parts of the city without having to meet the heavy claims for compensation to which experience has shewn the procedure under their Act of 1864 gives rise. They assert that the plaintiff's six houses are in a state so dangerous or injurious to health as to be unfit for human habitation within the meaning of s. 30 of the Act of 1890, and they contend that, if on this issue of fact the tribunal to which it has been referred for determination by the Legislature comes to a conclusion in their favour, they will be completely justified in having adopted a procedure whereby a necessary sanitary improvement has been effected without undue expense to the community at large. But to this the plaintiff replies that the proceedings of the Housing Committee as

evidenced in their own minutes, the reports and oral testimony of the medical officer of health, the procedure adopted in reference to houses similarly situated in the courts contiguous to and forming one area with Court No. 6, and the correspondence between the corporation officials and the plaintiff's agents with reference to these very houses, all demonstrate that the improvement which is aimed at is not the demolition of the six houses, but only the demolition of such of them as constitute an obstruction to a scheme of through ventilation affecting all the five contiguous courts which the medical officer of health has recommended and which the corporation have adopted; and she insists that this is an end which the corporation ought not to be allowed to reach by the means which they are now adopting.

If the plaintiff had established that the corporation were acting in bad faith or were endeavouring under colour of the exercise of statutory powers to evade a liability which they would otherwise be under, I think a state of things would have been proved sufficient to justify the intervention of this Court; but no such case has been made out, and when the whole of the documents and evidence are examined the result in my opinion comes to this, that the corporation allege that strictly they are entitled to insist upon the demolition of all the six houses, but at the same time they are prepared to mitigate the loss thereby occasioned to the owner if she will consent to the demolition of two of the houses and the preservation unbuilt upon of their sites, the medical officer of health being of opinion that the removal of these two particular houses and the creation thereby of the open spaces will render the remaining four houses reasonably fit for habitation. To this proposal is superadded an offer by the corporation to pay a nominal sum of 15*l.* as compensation in respect of each of the demolished houses, and in order to legalize the payment of this compensation it is proposed to adopt the procedure under the Act of 1864 as amended by s. 79 of the Act of 1882.

In these proposals I see nothing illegal or colourable or inconsistent with the right of the corporation to insist upon their claim to closing orders under s. 32 of the Act of 1890, and

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no special circumstances which warrant me in withdrawing the adjudication of that claim from the tribunal before which it is properly pending. I express no opinion whatever upon the question whether or not the claim can be substantiated. All I do is to refuse to interfere with the proceedings before the magistrate, and as the plaintiff has failed to obtain either a mandamus or an injunction, I have no alternative but to dismiss her action with costs.

Solicitors: *Blair & Girling, for Anthony & Imlach, Liverpool; F. Venn & Co., for E. R. Pickmere, Town Clerk, Liverpool.*

R. M.

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NEALE *v.* CITY OF BIRMINGHAM TRAMWAYS COMPANY.

[1910 N. 621.]

Company—Return of Capital to be called up again—Some Shares fully paid—Return on fully-paid Shares only—Companies (Consolidation) Act, 1908 (8 *Edw.* 7, *c.* 69), *s.* 40, *sub-s.* 1.

The defendant company had an issued capital of 40,000 preference shares of 5*l.* each fully paid and 60,000 ordinary shares of 5*l.* each, of which 6047 were fully paid and the residue were only paid to the extent of 1*l.* a share. By the articles of association dividends were paid in proportion to the amount paid up on the shares. The company had paid dividends of 10 per cent. on the amounts paid up on the ordinary shares and had accumulated a very large reserve fund consisting of undivided profits. A special resolution was duly passed and confirmed "That out of the accumulated profits of the company the sum of 4*l.* per share be paid to the holders of 6047 fully-paid ordinary shares of the company by way of reduction of capital pursuant to section 40 of the Companies (Consolidation) Act, 1908":—

Held, that that section could not be construed as only authorizing the return of capital to the whole class of shareholders among whom the accumulated profits were divisible, and therefore the resolution was not ultra vires.

THE City of Birmingham Tramways Company was incorporated in 1896 for the purpose of acquiring and working tramways in Birmingham and elsewhere. The capital of the company was 1,000,000*l.* divided into 80,000 preference shares and 120,000 ordinary shares, all of 5*l.* each; 40,000 of the preference shares

had been issued and were fully paid ; 60,000 of the ordinary shares had been issued, of which 6047 had been issued to the shareholders of an old company whose business was taken over and were fully paid ; the remaining 53,953 were paid up to the amount only of 1*l.* each. By virtue of article 98 of the articles of association dividends were paid to the shareholders in proportion to the amount paid up on their shares. The company had been very successful. They had for some time paid 10 per cent. dividends on the amount paid up on the ordinary shares and had a reserve fund of 487,680*l.* consisting of undivided profits.

At extraordinary general meetings of the company held on May 19 and June 9, 1910, a resolution was proposed by the directors, and duly passed and confirmed by the requisite majorities as a special resolution, " That out of the accumulated profits of the company the sum of 4*l.* per share be paid to the holders of the 6047 fully-paid ordinary shares of the company by way of reduction of capital, and free of income tax, pursuant to section 40 of the Companies (Consolidation) Act, 1908."

These resolutions were protested against by the holders of fully-paid shares, but were carried by the votes of the 53,953 shares on which only 1*l.* was paid. Practically all these shares were held by the British Electric Supply Company, and their nominees were in a majority on the board of directors.

The plaintiffs,who were holders of fully-paid ordinary shares, commenced this action against the company and the directors, and now moved for an injunction to restrain the defendants from acting on the resolution set out above.

The arguments turned on s. 40, sub-s. 1, of the Companies (Consolidation) Act, 1908. (1)

Sub-s. 2 of the same section provides for the registration of the resolutions, and sub-s. 3 provides that if any shareholder refuses to accept the repayment the money may be invested in

(1) "When a company has accumulated a sum of undivided profits, which with the sanction of the shareholders may be distributed among the shareholders in the form of a dividend or bonus, it may, by special resolution, return the same, or any part thereof, to the shareholders in reduction of the paid-up capital of the company, the unpaid capital being thereby increased by a similar amount."

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trust securities by the company and the interest paid to the shareholder.

Buckmaster, K.C., and *Tyldesley Jones*, for the motion. The section allows the division of money by way of return of capital. But the feature of the section is that the money to be returned must be divisible by way of bonus or dividend among the shareholders. The "shareholders" in the latter part of the section to whom the money is to be returned must be the same "shareholders" as those among whom it was divisible by way of profits. This company seeks to assert a power to pick and choose some named shareholders out of the class. In this case it will cause a serious loss to the holders of fully-paid shares and a gain to the holders of partly-paid shares by whose votes the resolution was carried. In some cases it might be a great advantage to the shareholders who were repaid. It cannot have been intended that the clause should be used to prejudice or benefit some selected shareholders out of a class.

There is no case exactly in point, but *In re Bridgewater Navigation Co.* (1) shews that a reserve fund built up out of profits is the property of all the ordinary shareholders. [They also referred to *In re Bridgewater Navigation Co.* (2)]

Gore-Browne, K.C., and *H. E. Wright*, for the company. Shareholders take subject to all rights which may be given to the company by Acts of Parliament as well as by legally made changes in the memorandum or articles, so the fully-paid shareholders must be taken to have paid up their shares with notice that their capital might be repaid. But there is no hardship. In an ordinary case of reduction the capital is returned as it would be in a winding-up, and then the fully-paid shares would be first reduced. The argument for the plaintiffs suggests that they have a perpetual right to receive 38 per cent. of the dividends. If the resolution were "That a sum of capital be repaid according to the rights of the parties" the excess on the fully-paid shares would have to be paid first. The process may be a loss or profit to the fully-paid shareholders according to the prosperity of the company, but that cannot affect the company's

(1) [1891] 2 Ch. 317. (2) (1888) 39 Ch. D. 1.

right. The repayment does not require the sanction or approval of the Court. If what is proposed is within the company's power the Court cannot interfere. *In re Crichton's Oil Co.* (1) shews that *In re Bridgewater Navigation Co.* (2) depended on the special words of the articles.

Buckmaster, K.C., in reply.

SWINFEN EADY J. This is a motion by the plaintiffs, who are two ordinary shareholders of the company, to restrain the defendants from acting on a special resolution of the company duly passed and confirmed, that out of the accumulated profits of the defendant company a sum of 4*l.* per share be paid to the holders of 6047 fully-paid ordinary shares of the company by way of reduction of capital.

The facts are these. The City of Birmingham Tramways Company is a successful company. It has issued 40,000 preference shares of 5*l.* each, and those are all fully paid; that is 200,000*l.* preference capital. That carries a preferential right to dividend and priority of capital in the winding-up. It has also issued 6047 ordinary shares upon which the full sum of 5*l.* per share is to be deemed to be paid up, and it has issued 53,953 ordinary shares upon which 1*l.* only of the 5*l.* is to be deemed to be paid up. It has accumulated a large reserve, and in the balance-sheet before me on December 31 last the reserve fund appears to have amounted to 487,000*l.*

The effect of the resolution which the company have passed is this. Out of the reserve fund, that is, money representing accumulated profits, it is proposed to pay to the holders of the 6047 shares 4*l.* per share. The effect of that will be to make all the issued ordinary shares 1*l.* paid, to place them all upon the same footing. The holders of the 6047 shares complain of that, upon this ground. They say that, the company being a successful company and the profits being large and the distribution being not per share but according to the amount paid up, after paying the preference capital the distribution upon the ordinary shares is such that the holders of the 6047 shares receive a handsome dividend. They complain of this resolution, their point being

(1) [1902] 2 Ch. 86. (2) [1891] 2 Ch. 317.

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that the remaining ordinary shareholders are using their voting power to resolve that there be repaid 4*l.* a share on the 6047 shares to the intent that those shareholders who have hitherto received the full dividends on their 5*l.* may henceforth receive dividend only on 1*l.* and be just on the same footing as the other ordinary shareholders are; and they maintain that the case is not within the 40th section of the Companies (Consolidation) Act, 1908, properly construed.

Now this is not a case in which the Court is asked to confirm a special resolution, or to confirm a reduction of capital, or in which the Court has any discretion in the matter. It is a short point of law arising on the construction of the statute, and the question is, Does the 40th section entitle the defendants to do what they are doing? That is the question, and the only question, before me. I have no discretion to exercise and I have not to consider whether they ought, or ought not, to do it. The only point is, have they the legal power to do it?

Sect. 40, sub-s. 1, of the Companies (Consolidation) Act, 1908, provides: [His Lordship read the section, and continued.] In other words, they are to pay out of accumulated profits subscribed capital. It is a return of subscribed capital out of profits but with a liability on the shareholder to be called upon to repay. It is an uncovering of the shares to the extent of the capital so repaid. If any shareholder is unwilling to receive the amount which it is proposed to repay him, another sub-section contains a provision for the amount to be retained and invested by the company.

The ground upon which Mr. Buckmaster has sought to sustain this motion is this. He contended that s. 40, sub-s. 1, when it provides that "when a company has accumulated a sum of undivided profits, which with the sanction of the shareholders may be distributed among the shareholders in the form of a dividend or bonus, it may, by special resolution, return the same, or any part thereof, to the shareholders" means "the same shareholders," that is, the whole class of the shareholders amongst whom the money is at the moment divisible or distributable. That you are to consider the position at the time the resolution is passed, and see amongst whom, according to their rights and

interests, this accumulated sum ought to be divided. If the preference dividend has been paid up to date the preference shareholders cannot share in it. It is then said that it must be divided among all the shareholders, that is, all the ordinary shareholders, and it must be divided among them rateably according to the amount paid up on their shares, if it is divisible as dividend, but at all events it is divisible amongst the ordinary shareholders. Then the contention is that by special resolution it can only be returned to the same persons—that is all the ordinary shareholders in the present case, and that the company have no right to select certain of them, 6047 out of 60,000, and say that they will return 4*l.* per share to some only of the shareholders. Although the shareholders to whom it is proposed to repay this capital are in a sense selected, they are all upon the same footing: that is, the whole 6047 have paid up 5*l.* per share. It is proposed to deal with them all equally, to repay them 4*l.* so as to leave them with shares 1*l.* paid up, and then they are to be exactly upon the same footing as the remaining ordinary shareholders.

In my opinion it is impossible to put such a narrow construction on s. 40 as has been contended for. The purpose for which the section refers to the money being distributed in the form of a dividend is to make a clear distinction between capital on the one hand and accumulated profits available for dividend on the other. The sum to be returned is a sum of undivided profits which with the sanction of the shareholders may be distributed among the shareholders in the form of a dividend or bonus. It is a sum of net profit immediately divisible among the shareholders should they so determine.

In principle I am of opinion that if the company had so determined, there was and is now nothing to prevent them out of their accumulated profits repaying part of the preference capital. They can distribute it if they so please amongst the preference shareholders in reduction of the paid-up preference capital of the company. Sub-s. 1 does not confine the distribution to the same shareholders, and in the same proportions, as would be entitled to the fund, if it were now distributed by way of dividend.

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There are not any circumstances of equity requiring the Court to restrain the proposed distribution, which is within the language of s. 40.

The result is that the motion fails.

Solicitors: *T. Hamilton Bevan, for George Huggins, Birmingham; Field, Roscoe & Co.*

J. R. B.

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July 19.

In re BRITISH POWER TRACTION AND LIGHTING COMPANY, LIMITED.

HALIFAX JOINT STOCK BANKING COMPANY, LIMITED *v.* BRITISH POWER TRACTION AND LIGHTING COMPANY, LIMITED.

[1902 B. 3355.]

Company—Debenture-holders' Action—Receiver and Manager—Bond—Sureties—Default—Rights of Trade Creditors.

A receiver and manager in a debenture-holders' action gave the usual security by a bond with sureties.

He properly incurred and was entitled to be indemnified by the estate against trade liabilities to the extent of 900*l.* for goods supplied to him on credit, of which the estate had the benefit, but his cash account was deficient by 400*l.* which he was unable to pay:—

Held, that the trade creditors could only claim against the estate to the net amount of the receiver's indemnity, i.e., 500*l.*, and they and not the sureties must bear the loss of the 400*l.*

In re Johnson, (1880) 15 Ch. D. 548, 555, applied.

SUMMONS.

This was a debenture-holders' action.

By an order of August 27, 1902, Watkins was appointed receiver and manager and was ordered to give security and to pass his accounts and to pay any balances certified to be due from him in such manner as the judge should direct.

By orders of August 28 and September 4, 1902, Watkins was authorized to borrow up to 3000*l.* to be secured as a first charge on the assets.

On September 15, 1902, Watkins and certain sureties entered into a bond with two Chancery Masters in the penal sum of 10,000*l.*, conditioned to be void if Watkins should duly account

for what he received or became liable to pay or account for as receiver and manager, a certificate under the hand of the Master of the Supreme Court to be conclusive evidence against Watkins and the sureties of the amount that Watkins was liable to pay and had not paid.

During his period of office Watkins borrowed in excess of 3000*l.* and also incurred heavy liabilities to trade creditors for goods supplied.

On December 16, 1902, a compulsory winding-up order was made.

By an order of February 11, 1903, Norton was appointed receiver and manager in place of Watkins, who retired. Norton was ordered to make provision for paying the liabilities properly incurred by Watkins, who undertook to lodge his account.

By an order of July 19, 1904, the following inquiries were directed, namely, (*a*) What creditors there were in respect of debts and liabilities incurred by Watkins and what were the amounts due to those creditors respectively. (*b*) Whether Watkins was entitled to be indemnified out of the company's assets in respect of the said debts and liabilities or any of them, and, if so, to what extent. (*c*) What security was given by Watkins and what steps ought to be taken to enforce it.

By an order of February 6, 1906, it was declared that Watkins was entitled to be indemnified out of the company's assets in respect of those liabilities only (over and above the permitted 3000*l.*) as to which he should satisfy the judge that having regard to all the circumstances under which the same were respectively incurred he was justified in incurring them without first obtaining the judge's leave: vide *In re British Power Traction and Lighting Co.* (1)

On February 14, 1907, an order was made deciding certain further questions of principle arising on the inquiries: vide *In re British Power Traction and Lighting Co.* (2)

By his certificate dated July 1, 1908, the registrar certified (inter alia) that the debts and liabilities incurred by Watkins (over and above the permitted 3000*l.*) in respect of which he was entitled to be indemnified out of the assets amounted to

(1) [1906] 1 Ch. 497, 507. (2) [1907] 1 Ch. 528.

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900*l.*—in round figures—but the extent of that indemnity could not be ascertained until after his account had been certified. The creditors' names and the amounts due were stated in a schedule. At the request of the parties the registrar forbore to certify what steps (if any) should be taken to enforce the security.

By a certificate dated March 3, 1909, the registrar certified that 400*l.*—in round figures—was due from Watkins on the passing of his accounts, which sum was to be paid into Court in pursuance of the order of August 27, 1902. This sum was never paid into Court, and Watkins was admittedly unable to pay it. It appeared from the registrar's notes that the question who was liable to pay the balance due from Watkins was expressly kept open when this certificate was settled.

On April 15 and June 1, 1910, the action came on on further consideration. The debenture-holders with conduct of the action asked for a declaration that the sum of 400*l.* due from Watkins ought to be set off against the 900*l.* debts and liabilities in respect of which he was entitled to be indemnified. Denton on behalf of the creditors admitted by the certificate of July 1, 1908, opposed the application and claimed that the bond should be put in force against the sureties in respect of the 400*l.* found due, and the sureties having submitted to the jurisdiction of the Court in this action as fully as if an action to enforce their bond as sureties had been brought, it was ordered that as on April 15, 1910, Denton as representing the said creditors be at liberty (as between him and them and the applicants at his and their own risk as to costs) to take such proceedings in the action as he might be advised to enforce the liability (if any) of the said sureties, a sum of 1000*l.* to be retained in Court pending the result of those proceedings. The remaining funds were applied in payment of costs and the 3000*l.* and interest, so that there was nothing for the debenture-holders.

By the present summons Denton on behalf of the indemnity creditors asked for an order that a certificate should issue finding that there was a sum of 400*l.* due from Watkins and that he had made default in payment of that sum in pursuance of the certificate of March 3, 1909, and that the sureties were liable to make good that default under their bond.

Cave, K.C., and *J. H. Layton*, for the indemnity creditors. The object of the summons is to enforce the bond against the sureties. The Chancery Masters would be the proper plaintiffs, but the sureties have submitted to the jurisdiction, and the order on further consideration allows the point to be raised in this way. Watkins having made default in paying the 400*l.*, the bond is enforceable. By way of equitable relief the sureties claim to set off the 900*l.* unpaid trade debts incurred by Watkins for goods supplied, for which amount Watkins was entitled to be indemnified by the estate which received the goods. This is not a proper subject of set-off. Watkins could not have said "I owe the estate 400*l.* I will not pay it, because I owe 900*l.* to my trade creditors, for the payment of which the estate is liable to indemnify me."

[SWINFEN EADY J. I will hear the other side.]

Younger, K.C., and *Cozens-Hardy*, for the sureties. This is a claim by trade creditors in respect of goods supplied to Watkins. They have no direct claim against the estate. They can only claim through Watkins to the "net amount" of Watkins' indemnity: *In re British Power Traction and Lighting Co.* (1) Now the gross indemnity allowed to Watkins is 900*l.*, and if he had paid the 400*l.* due from him to the estate he could call on the estate to pay the creditors to the amount of that gross indemnity. But as it is he has 400*l.* of the estate's money in his hands, so that he is fully indemnified to that amount, and he can only call on the estate to pay the 500*l.* excess. In other words, Watkins cannot claim his indemnity without making good his default, and the creditors, who can only claim through Watkins' indemnity, are in no better position: *In re Johnson* (2); *Dowse* v. *Gorton*. (3)

The existence of the bond does not increase their rights. They were not obligees, so they cannot enforce it at law. It was given to secure the estate, not Watkins' creditors, so that they cannot enforce it in equity. The estate has lost nothing by Watkins' default, so that in substance the condition is unbroken and the bond is not enforceable by any one.

(1) [1907] 1 Ch. 528, 535. (2) 15 Ch. D. 548, 552, 555.
(3) [1891] A. C. 190, 197.

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Hon. Frank Russell, K.C., and *Whinney*, for the debenture-holders with conduct of the action.

Cave, K.C., in reply. The sureties' argument has proceeded on the footing that we are suing the estate for payment. We should, no doubt, then only recover subject to making good Watkins' default. But that is not the application. The application is that the sureties should pay the estate the 400*l.* which Watkins received and failed to pay. How can Watkins or his sureties set off as against a liquidated demand a right to indemnity for other debts which Watkins failed to pay?

It is true that Watkins was receiver for the estate, not for us. But the estate had the benefit of our goods and ought to enforce any remedies to enable it to pay for them. The exact point has not been decided, but in *In re London United Breweries, Ld.* (1) the sureties paid the 171*l.* receiver's balance without raising this objection, although the receiver was entitled to an indemnity for 1275*l.* liability for unpaid debts for goods supplied.

Consider the sureties' position in the matter. If there had been a sufficient stock of goods in hand, and no more had been supplied, the sureties would have had to pay the 400*l.* The same result would have followed if Watkins had ordered and paid for 900*l.* further goods, or if Norton, as directed by the order of February 11, 1903, had made provision for paying for them. Is the sureties' liability gone because the goods were not paid for? In other words, are the sureties entitled to have our goods applied in discharge of their liability for Watkins' default on his cash account?

The assumption that the bond was only given to secure the estate from net loss really begs the question in favour of the sureties. Of course there is no net loss if the estate can keep 400*l.* worth of our goods without paying for them. But the bond was in terms given to secure the amount which Watkins received and did not account for. That amount was 400*l.* The condition of the bond is broken, and the whole penalty is enforceable at law. The sureties are no doubt entitled to equitable relief on paying the 400*l.*, but the claim that the amount must be paid out of our goods is inequitable and ought not to be allowed.

(1) [1907] 2 Ch. 511.

SWINFEN EADY J. In whatever way the case is put the real question is who is to bear the loss occasioned by Watkins having as receiver and manager received 400*l.* which is not forthcoming?

The material facts are few and lie in a narrow compass. The action is a debenture-holders' action. Watkins was appointed receiver and manager and gave security by a bond with sureties. In carrying on the business he received certain moneys and incurred certain liabilities to trade creditors, which liabilities remain unpaid.

It has been determined in the previous proceedings that if Watkins were to pay 900*l.* to certain trade creditors it would be a proper payment to be allowed in his account. In other words, the registrar certified that Watkins was entitled to be indemnified out of the assets for the 900*l.* due to those creditors, but that the extent of that indemnity could not be ascertained until after his account had been certified. When the cash account was taken it was found that Watkins had a balance of 400*l.* in his hands. He was directed to pay it into Court. He did not do so, and it is not forthcoming. I am told he became bankrupt.

The real question is whether the loss of the 400*l.* is to fall on the trade creditors or the sureties, and this in substance though not in form is the question raised by the summons.

My first impression was that the creditors' contention was right, but on further considering the matter I have come to the conclusion that this is not the true view, and for this reason. The right of the trade creditors was to sue Watkins, to whom they gave credit. He would have had no answer to their claim. But can they through him claim against the estate of which they are not creditors? The answer is that they can only claim through him to the extent of his right of indemnity against the estate. Now Watkins has 400*l.* of the estate's money in his hands, and if he asked the estate to indemnify him by paying the 900*l.* to the trade creditors, the estate would reply "Pay them the 400*l.* in your hands and we will indemnify you by paying the 500*l.* balance."

The true position is this. The trade creditors have no higher right than Watkins against the estate. If Watkins paid

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them the whole 900*l.* he could only come against the estate for the difference between the 900*l.* and the 400*l.* in his hands, i.e., 500*l.*

In *In re Johnson* (1) Jessel M.R. said: "If the right of the creditors is, as is stated by Lord Justice Turner, the right to put themselves, so to speak, in the place of a trustee, who is entitled to an indemnity, of course, if the trustee is not entitled, except on terms to make good a loss to the trust estate, the creditors cannot have a better right." Reading "receiver and manager" in lieu of "trustee" the passage is exactly in point.

Watkins could only claim an indemnity subject to giving credit for the 400*l.* in his hands, and the creditors claiming through him are in the same position. In other words, their claim against the estate is limited to 500*l.*

The creditors contended that the case must be treated as if the bond were in suit, and dealt with on strict legal principles. But the order on further consideration was not intended to give them any tactical advantage. It merely enabled them to get this point of principle determined in a summary way without objection on point of form. Even if I were to treat the bond as technically in suit, I should still have to consider the question of substance, and it would be no use to order the sureties to pay the 400*l.* into Court to a separate account, if it would merely have to be paid back again.

The real question is who are the persons to suffer the loss arising from Watkins' default? The answer is that it must fall on those who gave credit to him. They have no higher rights than Watkins against the estate, and can only claim what he himself could claim. The summons must, therefore, be refused.

Solicitors: *Tippetts, for J. H. Wall, Bootle, Lancashire; Howe & Rake, for Lucas, Hutchinson & Meek, Darlington; Smiles & Co.*

(1) 15 Ch. D. 548, 555.

G. R. A.

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July 26.

In re UNITED PROVIDENT ASSURANCE COMPANY, LIMITED.

[007 of 1910.]

Company—Scheme of Arrangement—Winding-up—Meetings of Members—Separate Classes—Fully-paid Shares—Shares partly paid with uncalled Balance paid in Advance of Calls—Companies (Consolidation) Act, 1908 (8 *Edw.* 7, *c.* 69), *s.* 120.

For the purpose of class meetings of members summoned in a winding-up to approve a scheme of arrangement under s. 120 of the Companies (Consolidation) Act, 1908, holders of shares partly paid with the uncalled balance paid in advance of calls and carrying interest are a different class to holders of fully-paid shares.

In re Exchange Drapery Co., (1888) 38 Ch. D. 171, 175, and *In re Wakefield Rolling Stock Co.*, [1892] 3 Ch. 165, 174, applied.

PETITION.

This was a petition by the above company and its liquidator asking that a scheme of arrangement might be sanctioned so as to be binding on all the members or contributories of the company.

By an agreement of August 27, 1909, this company agreed to sell its business and assets (except its uncalled capital) to a purchasing company in consideration of 159,807 fully-paid 1*l.* shares and 60,387 1*l.* shares with 10*s.* credited as paid up in that purchasing company, and this agreement was sanctioned by the Court on December 11, 1909. On January 6, 1910, the vendor company went into voluntary liquidation.

There were four groups of shareholders, namely, group A—the holders of 150,000 1*l.* fully-paid ordinary shares; group B—the holders of 52,777 1*l.* ordinary shares with 10*s.* paid up; group C—the holders of 7610 1*l.* ordinary shares with 10*s.* paid up and another 10*s.* paid in advance of calls under an article equivalent to Table A, art. 17, the latter amount carrying 5 per cent. interest; group D—the holders of 4808 1*l.* fully-paid deferred shares.

A scheme was prepared under which group A were to receive an equivalent number of fully-paid 1*l.* shares in the purchasing

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company, and group B an equivalent number of 1*l.* shares with 10*s.* paid up.

Group C were to receive an equivalent number of 1*l.* shares with 10*s.* paid up, but immediately after allotment the sum paid up by them in advance of calls, which was a liability of the vendor company payable by the purchasing company, was to be applied by the liquidator in payment of the unpaid capital, which capital was to be forthwith called up by the purchasing company without any notice of call and paid accordingly, so that the shares should be converted into fully-paid shares.

Group D were to receive two and a half fully-paid 1*l.* shares for each deferred share, fractional shares when occurring being paid out of the proceeds of sale of other shares. This was in accordance with their relative rights under the articles.

The scheme provided that in the winding up of the vendor company no call should be made on the holders of partly-paid shares for the adjustment of the rights of contributories.

In pursuance of the registrar's directions, the liquidator convened separate meetings of the four groups to consider the scheme, and it was unanimously approved by groups A, B, and D. It was approved on a show of hands by group C. A poll was demanded, which the liquidator, under some misapprehension as to the rights of the members, refused. The meeting was consequently abortive.

In pursuance of a further direction of the registrar, the liquidator convened two separate meetings of groups A and C combined and groups B and C combined. At these meetings the scheme was approved, the votes of group C being completely swamped by the votes of group A and group B respectively.

The petition now came on for hearing. It was opposed by a majority of group C, and it was admitted that if group C were entitled to express their views as a separate class under s. 120 of the Companies (Consolidation) Act, 1908, there was not the smallest chance of the necessary three-fourths majority being obtained, and the scheme could not go through.

Hon. E. C. Macnaghten, K.C., and *Whinney*, for the petitioners. The only question is whether group C are a separate class of

members under s. 120. We say that at the winding-up they substantially became fully-paid shareholders.

[SWINFEN EADY J. You are not treating them as fully-paid shareholders. You treat them as under a liability, and make them give up certain rights in order to meet it. Those rights are to be repaid the 10*s.* paid in advance of calls with interest to the time of repayment. The interest does not cease at the winding-up: *In re Exchange Drapery Co.* (1); *In re Wakefield Rolling Stock Co.* (2)]

The claim to interest must be conceded, but except for that, if a call were made, they would be in the position of fully-paid shareholders.

[SWINFEN EADY J. You are treating them as if there had been a call on their shares alone. That would be ultra vires. You would also have to make the same call on class B.]

That could be done if considered desirable.

[SWINFEN EADY J. It is not your scheme. The other alternative is to have no call, but return the 10*s.* paid in advance.]

We could not get that approved. If, however, we made a call on all the unpaid shares, group C would in substance become fully-paid shareholders, and their right to interest does not make them a separate class.

Clauson and *Hon. Malcolm Macnaghten*, for members of group C. We are clearly a separate class, and there is no jurisdiction to sanction the scheme without our approval. Apart from that the Court ought not to sanction a scheme which converts our shares into fully-paid shares, gives us no interest for the amounts paid in advance of calls, and precludes any call on group B. The scheme is obviously unfair to us in these respects.

SWINFEN EADY J. (after stating the facts). The question is whether there have been proper class meetings under s. 120, which provides as follows:—Sub-s. 1: "Where a compromise or arrangement is proposed . . . . between the company and its members or any class of them, the Court may, on the application in a summary way of the company . . . . or, in the case of a company being wound up, of the liquidator, order a meeting

(1) 38 Ch. D. 171, 175. (2) [1892] 3 Ch. 165, 174.

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. . . . of the members of the company or class of members, as the case may be, to be summoned in such manner as the Court directs." Sub-s. 2: "If a majority in number representing three-fourths in value of the . . . . members or class of members, as the case may be, present either in person or by proxy at the meeting, agree to any compromise or arrangement, the compromise or arrangement shall, if sanctioned by the Court, be binding . . . . on the members or class of members, as the case may be, and also on the company or, in the case of a company in the course of being wound up, on the liquidator and contributories of the company."

The question is whether it was not essential to hold a separate class meeting of group C. The company contended that this was not necessary, and that group C were in the same position as group A, the holders of fully-paid shares. They contended that if a call were made the 10*s.* paid in advance would be applied in payment of the call, the interest ceasing on the winding-up, and therefore group C were in the same position as the fully-paid shareholders of group A. The first answer is that they are not in the same position. In group A the shares are fully called and paid up, and the shareholders have only the rights of fully-paid shareholders. In group C the 10*s.* unpaid has not yet been called up, and the shareholders are entitled to interest on the amount paid in advance of calls until repayment. This was decided in *In re Exchange Drapery Co.* (1) and *In re Wakefield Rolling Stock Co.* (2) The company contended that if a call were made group C would be in the same position as group A. The answer is that a call could not be made on group C alone. It would have to be made on all the unpaid shares rateably.

In my opinion the shareholders of group C constitute a separate class with separate rights under s. 120 and are not in the same position as fully-paid shareholders, and if a call were made and paid on all the unpaid shares they would still have their right to repayment of their 10*s.* with interest. They clearly constitute a separate class within s. 120, and as they have had no separate meeting, other than the abortive meeting which does not count, there have not been proper meetings within the section.

(1) 38 Ch. D. 171, 175. (2) [1892] 3 Ch. 165, 174.

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Further, the objection goes to substance as well as form. The scheme treats group C as if a call were made on them alone. It proposes to give them shares in the purchasing company credited in the first instance with 10*s.* paid up, and then, without giving them any option in the matter, to apply the amount paid in advance of calls in payment of the second 10*s.*, so that they would ultimately hold fully-paid shares in the purchasing company without any call being made and without any choice in the matter. Group B, on the other hand, are to receive 1*l.* shares with 10*s.* paid up, leaving 10*s.* uncalled. In these circumstances the objection that there have not been proper class meetings is fatal, and I cannot sanction the scheme.

Solicitors: *E. B. Gee & Co.; Burton, Yeates & Hart, for E. Cooper & Son, Blackburn; James, Mellor, Coleman & James, for N. Battersby, Southport.*

G. R. A.

In re WILLIAMS' SETTLED ESTATES.

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June 11, 18, 22; *July* 30.

Practice—Payment out of Court—Wrong Person—Liability of Consolidated Fund—Court of Chancery (Funds) Act, 1872 (35 & 36 *Vict. c.* 44), *ss.* 5, 6, 14—*Supreme Court of Judicature (Funds, &c.) Act*, 1883 (46 & 47 *Vict. c.* 29), *ss.* 1, 3.

Where money is ordered to be paid out of Court to a person apparently but not really entitled, and the Paymaster-General obeys the order, then, except possibly in cases where the order was obtained by fraud or forgery, the person really entitled, though not before the Court when the order was made, has no claim upon the Consolidated Fund.

Court of Chancery (Funds) Act, 1872, and Supreme Court of Judicature (Funds, &c.) Act, 1883, considered and explained.

In re Dangar's Trusts, (1889) 41 Ch. D. 178, 186, followed.

Jones v. *Jones*, (1879) [1901] 1 Ch. 464, n., and *Bath* v. *Bath*, [1901] 1 Ch. 460, explained.

Slater v. *Slater*, (1888) [1897] 1 Ch. 222, n., and *Marsh* v. *Joseph*, [1897] 1 Ch. 213, distinguished.

PETITION.

This was in effect a petition to make the Consolidated Fund liable for a mispayment out of Court expressly directed by Kay J. on incorrect though not fraudulent allegations and evidence.

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The following statement of the case is taken from the written judgment of Swinfen Eady J. on the present petition:—

"The petitioner in this case alleges that a fund which was formerly in Court was improperly divided into two equal moieties and paid out of Court by an order of Kay J. made on August 3, 1889, when the petitioner was about six months old. She contends that the fund was really divisible into three equal parts, and that she was and is entitled to one equal third; that the previous order made by Kay J. ought now to be discharged, and an order made for payment to her of a sum equivalent to the one third which would now be in Court if the previous order had not been made, so that she may then be in a position (on non-payment by the Paymaster-General) to say that the Paymaster-General is in default, and that the Consolidated Fund of the United Kingdom is liable to make good to her the amount so ordered to be paid to her by the Court.

"The facts are as follows: The petitioner is Dorothy Madeleine Williams, who was born on January 30, 1889, and therefore attained twenty-one in January, 1910. She asks to have it determined that, according to the true construction of the will of her great-grandfather, Morgan Williams, she became entitled on the death of her grandfather, William Williams, as one of his issue who survived him, to an equal undivided share as tenant in common with her father, James Williams, and her aunt, Madeleine Fenn Williams, in one third part of all the freehold, leasehold, and copyhold estates in Wales devised and bequeathed by the will of the said testator Morgan Williams for the benefit of William Williams and his issue him surviving.

"Morgan Williams, the testator, by his will, dated November 23, 1839, directed that his freehold and leasehold estates situate in Wales should not be sold, but that the rents and produce thereof should be equally divided between his wife, Charlotte Ann Williams, and his three children, namely, his sons Ellis Williams and William Williams, and his daughter Charlotte Ann Williams, subject as therein mentioned, and the will then proceeded as follows: 'And after the decease of my said wife, I give, devise, and bequeath all the fee simple and inheritance of my said freehold, leasehold, or copyhold estates in Wales unto

and equally between my said three children, the said Ellis Williams, William Williams, and Charlotte Ann Williams, spinster (subject to the hereinafter named condition as to her), as tenants in common and not as joint tenants, and from and after the decease of my said three children leaving issue them surviving, unto such issue respectively, and their heirs, executors, administrators, and assigns for ever.'

"The testator died on July 15, 1840, and Charlotte Ann Williams, his widow, died on December 7, 1851.

"The testator's son Ellis Williams was married three times and had numerous children, and died on December 9, 1902.

"The testator's daughter Charlotte Ann Williams married George Fenn on March 20, 1845, and died March 15, 1865; she had one child, Charlotte Ann Emily Fenn (afterwards Mrs. Kidson), born January 9, 1846.

"The testator's son William Williams was married on February 19, 1853, and died on June 13, 1889. He had three children, namely, (1.) James Williams, who was born November 24, 1853, married May 7, 1885, and had one child, the petitioner, born January 30, 1889; (2.) Ellis Morgan Williams, born June 6, 1855, died July 7, 1865; (3.) Madeleine Fenn Williams, born March 8, 1857.

"Thus, on the death of the testator's son William Williams, his issue then living were his son James, his daughter Madeleine, and his granddaughter the petitioner, then an infant under five months old.

"In respect of a portion of the property devised by the said testator, a mining lease was granted under the Settled Estates Act, 1856, and by an order of Stuart V.-C. sanctioning this lease, dated May 8, 1863, the money to be set aside out of the receipts as capital money was directed to be paid into Court to the credit of 'ex parte the issue of the petitioners Ellis Williams, William Williams, and Charlotte Ann Fenn.'

"Other portions of the property devised by the said testator were sold from time to time under the Settled Estates Acts, and the proceeds paid into Court under various orders.

"By an order of Malins V.-C., dated November 18, 1870, sanctioning the sale of certain hereditaments to one Samuel Holland for

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4320*l.*, it was ordered that 1440*l.*, being one third part of the purchase-money, be paid to Charlotte Ann Emily Fenn; another sum of 1440*l.* (being another third part) into the bank to the credit of ex parte Ellis Williams and other named persons (being his children); and the remaining 1440*l.* into the bank to the credit of 'ex parte William Williams and James Williams and Madeleine Fenn Williams, infants. In the matter of an Act to facilitate leases and sales of settled estates, 19th and 20th Victoria, chapter 120. The proceeds of the sale of part of the settled estates of Morgan Williams' subject to further order.

"By another order of Malins V.-C., dated May 17, 1878, dealing with a sum of 5897*l.* 19*s.* 7*d.* New 3 per cent. Annuities in Court, representing the proceeds of sale of other portions of the devised estates, it was ordered that the funds be divided into three equal parts, one part being paid out to the trustees of the marriage settlement of Mrs. W. H. Kidson (formerly Charlotte Ann Emily Fenn, spinster); another third part was ordered to be carried over to the credit of an account to be entitled 'In the matter of Morgan Williams' estates and the Settled Estates Act, 1877. The share of Ellis Williams and his children in proceeds of sale'; and the remaining third part was ordered to be carried over to the credit of an account to be entitled 'In the matter of Morgan Williams' estates and of the Settled Estates Act, 1877. The share of William Williams and his children in proceeds of sale.'

"From the titles of these accounts it would appear that Malins V.-C. was of opinion that the word 'issue' in the will of the testator meant 'children.'

"The dividends on the one third share of William Williams in the funds in Court were paid to him during his life, and after his death on June 13, 1889, a petition was presented by his executrix and his two children James and Madeleine to pay out the capital of the fund to these two children. The petition was heard by Kay J. on August 3, 1889. The petition alleged (paragraph 6) that 'there was issue of the said marriage' of William Williams 'three children, and no more,' namely, the three children previously mentioned. It did not disclose the fact that there was further issue, namely, a grandchild, the

present petitioner, who was then about six months old. An affidavit in support of the petition was made by Mrs. Clara Williams, the widow and executrix of William Williams, and this affidavit also stated that there was issue of the marriage three children and no more, and did not disclose the existence of the petitioner. Kay J. made an order on the petition dividing the capital of William Williams' one third share into moieties, paying out one moiety to his son James Williams, and the other moiety to his daughter Madeleine Fenn Williams. It is this division which the petitioner now complains of.

"The remaining third share, namely, the share of Ellis Williams, remained in Court until after the death of Ellis Williams on December 9, 1902. A petition was then presented for payment out of Court of the capital of this share, and there were in existence children and remoter issue of Ellis Williams, and a question was raised as to the true meaning of the word 'issue' in the will of Morgan Williams, the testator, and by an order made by Farwell J. on June 27, 1903, the Court declared 'that according to the true construction of the will of the testator Morgan Williams, and as regards the gift over, the word "issue" is not to be confined to the children, but includes all descendants, however remote, of Ellis Williams living at his death,' and an inquiry was directed to ascertain the persons so entitled.

"The petitioner now asks that the construction which Farwell J. has declared to be the true construction may be put upon the will, so far as regards the one third share of her grandfather William Williams, and an order made on that footing as if the fund were still in Court."

The Paymaster-General, the Treasury Commissioners, the petitioner's aunt, Madeleine Fenn Williams, and her mother, Agnes Marion Williams, the widow and executrix of her father, James Williams, were made respondents, no relief except costs being asked against the last two respondents. The last respondent did not appear at the hearing.

It was admitted that Farwell J.'s construction of the will must be accepted, and that the word "issue" must be read strictly.

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Micklem, K.C., and *Harman*, for the petitioner. In order to properly appreciate the effect of the Court of Chancery (Funds) Act, 1872, and the Supreme Court of Judicature (Funds, &c.) Act, 1883, the previous condition of the Chancery funds must be considered.

In former days the suitors simply paid their moneys to the Masters or usher, who were treated as debtors and not trustees: *Trevor* v. *Blucke*. (1)

By the 12 Geo. 1, c. 32 (1725), intituled "An Act for better securing the monies and effects of the suitors of the Court of Chancery; . . . ." an Accountant-General of the Court was appointed in the place of the Masters and usher. He was not to meddle with the receipt of the suitors' money, but only to keep the account at the Bank of England, who were to be responsible for moneys actually received by them.

By the 54 Geo. 3, c. 14 (1813), intituled "An Act to provide that property vested in the Accountant-General of the High Court of Chancery as such, shall, upon his death, removal or resignation, vest from time to time in those who shall succeed to the office," it was provided that property vested in the Accountant-General should on the above events vest in his successor "subject to the same trusts as the same were before respectively subject to," and that all acts done by the Accountant-General under any order of the Court of Chancery touching any property vested in him should be "deemed and taken to be valid and effectual."

After the appointment of the Accountant-General the Court of Chancery was regarded as a trustee of the funds. This appears from *Trevor* v. *Blucke* (1), where Lord Cranworth L.C. said: "We are so much in the habit, as to moneys paid into Court, of considering the Court as a trustee for the parties beneficially interested, that we lose sight a little of the mode in which these matters were dealt with in bygone times." He then explained that in former days the Masters and usher were merely treated as debtors.

Again, the Chancery Funds Commission Report, 1864 (Parliamentary Papers, 1864, vol. 29), states (p. xvii.) that "The

(1) (1855) 6 D. M. & G. 170, 181.

suitors' cash in the Bank of England forms one common and general cash for the Accountant-General to draw upon. The various amounts belonging to the suitors of each of the different stocks stand in one sum in the name of the Accountant-General in trust to attend the orders of the Court"; and (p. xxxii.) that "The stocks and securities on these"—non-contentious—"accounts are retained in Court merely for the purpose of administration. As regards them the Court of Chancery is simply in the position of a trustee, retaining the principal under its control and protection, and paying the interest to the persons entitled to receive it. . . . . The persons interested in them receive their dividends without deduction; they are exempted from the expenses attending the appointment of new trustees and other expenses to which they might be liable if the money were not in Court, and they enjoy the advantage of having their principal secured by the Court of Chancery."

In those days, if there was any doubt about the title of the person asking for payment out being displaced, e.g., by other next of kin, birth of future children, or the appearance of a person presumed dead, a bond to refund was taken: Seton on Decrees, 3rd ed. p. 199; 4th ed. p. 974; *Lord Woodhouselee* v. *Dalrymple* (1); and this practice continued at least as late as 1876, but it is not the present practice: Seton on Judgments, 6th ed. pp. 1600, 1655. If the Court is not satisfied it refuses to pay out. If satisfied it pays out, and if the order proves to be wrong the Consolidated Fund is liable under the Court of Chancery (Funds) Act, 1872, and the Supreme Court of Judicature (Funds, &c.) Act, 1883.

The Court of Chancery (Funds) Act, 1872, recites that it is expedient to abolish the office of the Accountant-General, and to make provision for managing the suitors' moneys and securing them "on the Consolidated Fund," and for establishing a deposit account.

Sect. 4 substitutes the Paymaster-General for the Accountant-General, whose office is abolished.

Sect. 5 provides that the Consolidated Fund shall be liable to make good to the suitors all money and securities in Court, and

(1) (1861) 30 L. J. (Ch.) 607.

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all money and securities vested in the Paymaster-General by the Act. It then provides two modes of enforcing this liability in two different events. It provides that if the Lord Chancellor certifies to the Treasury that (*a*) the Paymaster-General has failed to pay any money or transfer any securities in Court required by any order of the Court to be paid or transferred or (*b*) has been guilty of any default with respect to such money or securities the Treasury shall cause to be paid out of the Consolidated Fund into the Bank of England, to the credit of the Paymaster-General, such sum of money as may be certified by the Lord Chancellor to be required (*a*) to pay the money or replace the securities so required to be paid or transferred or (*b*) make good such default.

Sect. 6 provides in substance that Acts and rules relating to the Accountant-General shall apply to the Paymaster-General.

Sect. 9 provides that the securities and money shall vest in the Paymaster-General for the time being "on behalf of the Court of Chancery" and shall be held by him "in trust to attend the orders of the Court of Chancery," and "all acts done by the Paymaster-General with reference to such securities and money in pursuance of an order of the Court of Chancery shall be valid and effectual."

This section protects the Paymaster-General who obeys the order, but it does not validate all orders for payment out.

Sect. 14 provides for the creation of the deposit account and also provides that the Consolidated Fund shall be liable to make good the deposit moneys and interest "in like manner as it is liable to make good money in Court."

The Supreme Court of Judicature (Funds, &c.) Act, 1883, provides as follows:—

Sect. 1 provides that there shall be one accounting department for the Supreme Court of Judicature.

Sect. 3 provides (*b*) that moneys and securities transferred, paid, or placed to the account or credit of the Paymaster-General shall be held by the Paymaster-General for the time being "in trust to attend the orders of the Court in regard thereto"; and (*c*) that "The Consolidated Fund shall be liable to make good

to the suitors of the Court the moneys and securities so transferred, paid, or placed to the account or credit of the Paymaster-General."

The effect of these sections, and particularly s. 5 of the 1872 Act, is that the Consolidated Fund is liable to the suitors for any mispayment. Now the order of Kay J. was made in the absence of the infant Dorothy and without jurisdiction as to her share. It had, therefore, no effect on her share, which must be regarded as still in Court: *In re Hambrough's Estate.* (1) The Paymaster-General is not in default, so that the matter cannot be set right by a certificate under s. 5 (*b*). Again, the Paymaster-General has not failed to pay the money. It is still notionally in Court, and no proper order for payment has been made, so we cannot at present ask for a certificate under s. 5 (*a*). A preliminary step is necessary. We must have an order for payment out of our money. If the Paymaster-General fails to pay in pursuance of that order, we shall be entitled to a certificate under s. 5 (*a*). This is in accordance with the practice settled by *Slater* v. *Slater* (2) and *Marsh* v. *Joseph.* (3)

[SWINFEN EADY J. In those cases the Paymaster-General did not pay the person indicated in the order.]

That default was not relied on. The order had been improperly obtained. The matter was dealt with under s. 5 (*a*) and a fresh order made. If the Paymaster-General's default had been relied on, it could have been dealt with under s. 5 (*b*).

In *Jones* v. *Jones* (4) and *Bath* v. *Bath* (5), the assignee of a fund not having obtained a stop order, the fund was paid out to the assignor. It was held that the assignee's negligence disentitled him to relief. In the present case no stop order was necessary. The petitioner was an original devisee of a share of the real estate represented by the funds in Court, and the Court had the will before it.

[SWINFEN EADY J. The Paymaster-General cannot be liable if he has simply obeyed the order of the Court: *In re Dangar's Trusts.* (6)]

(1) [1909] 2 Ch. 620.
(2) [1897] 1 Ch. 222, n.
(3) [1897] 1 Ch. 213.
(4) [1901] 1 Ch. 464, n.
(5) [1901] 1 Ch. 460.
(6) 41 Ch. D. 178, 186.

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That was an obiter dictum. The claim against the Paymaster-General was not pressed or argued, and the liability of the Consolidated Fund was not discussed, possibly because the erroneous order was made in 1871. The present case is clearly within the 1872 Act. We do not allege fraud. Our case is that the petitioner's money has been paid away per incuriam under an order made in her absence and wholly invalid against her. The liability of the Consolidated Fund is not limited to default of the Paymaster-General. It extends to default by the Court.

Sargant, for the Paymaster-General and the Treasury Commissioners. In this case the moneys were paid in under the Settled Estates Act, 1856 (19 & 20 Vict. c. 120), and under s. 23 were applicable (inter alia) in "the payment to any person becoming absolutely entitled." The Settled Estates Act, 1877 (40 & 41 Vict. c. 18), s. 34, contains a similar provision.

Order I., r. 14, of the Consolidated Orders provided that "Where, under or in pursuance of any decree or general or special order, any money shall be invested in the name of the Accountant-General, and with his privity, in the purchase of any stocks, funds, shares, or securities, or any stocks, funds, shares, or securities shall be transferred into his name and with his privity in the books of the Bank or of any other public company, he shall declare the trust thereof to be to attend the order of this Court, without any direction for that purpose in the decree or order directing such investment or transfer (August 22, 1859; Order 2)." See Morgan's Chancery Acts and Orders, 4th ed. (1868) p. 371.

This is an unprecedented attempt to make the Consolidated Fund liable for judicial error. The Court is the sovereign power acting judicially over the property, life, and liberty of the subject. Why should money in Court alone be secured against judicial error? There is no difference between orders made in the presence or absence of the parties. That is a matter of administration. In the present case the Court acted in rem.

Suppose the Court ordered trustees to pay away trust funds in their hands. It could either preface the order by a declaration binding the interests of absent parties, or it could simply

direct the trustees to pay. In the one case there would be a res judicata against the absent parties, in the other there would not. But in either case the trustees would be exonerated. Why are the Paymaster-General and the Consolidated Fund in a different position?

The suitors formerly had merely an action of debt against the clerks and usher. Then the Accountant-General was appointed and the Bank became liable to the suitors. It was not till the 1872 Act that any liability was cast on the Consolidated Fund, and all the Act does is to give the suitors a remedy against the Consolidated Fund in case of the Paymaster-General's default. Sect. 5 cannot be split up in the way suggested by the petitioner. The Paymaster-General's liability is secured on the fund, but the ambit of that liability is not increased. In the present case he obeyed the order implicitly and was not guilty of any default. The words "guilty of any default" in s. 5 of the 1872 Act "point to some act of misfeasance or carelessness attributable to the Paymaster-General himself, or to those under his direction and superintendence": *Jones* v. *Jones*. (1) If he simply obeys the order he is not liable—*In re Dangar's Trusts* (2)—and the payment out is clearly valid and effectual under s. 9 of the 1872 Act notwithstanding the invalidity of the order.

The present point was not taken in *Slater* v. *Slater* (3) or *Marsh* v. *Joseph* (4) because the Paymaster-General could not point to any order that he had obeyed. He was clearly in default and the Treasury did not resist the order. The Court, of course, treats the money as still in Court unless the order for payment out has been properly obeyed. These cases merely settled the machinery for putting the matter right in such a case. In the present case the payment out was valid, the money is not even notionally in Court, and the petitioner has no locus standi.

If the Consolidated Fund is liable for judicial error, the Paymaster-General and the Treasury Commissioners will have to be made respondents to every application for payment out on

(1) [1901] 1 Ch. 464, n., 465, n.
(2) 41 Ch. D. 178, 186.
(3) [1897] 1 Ch. 222, n.
(4) [1897] 1 Ch. 213.

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Act; and if the Lord Chancellor, either with or without a representation made to him by any suitor of the Court of Chancery, certifies to the Treasury in writing that the Paymaster-General has failed to pay any money in Court, or transfer or deliver any securities in Court, required by any order of the Court of Chancery to be paid, transferred, or delivered from his account, or has been guilty of any default with respect to such money or securities, the Treasury shall cause to be paid out of the growing produce of the Consolidated Fund into the Bank of England, to the credit of the Paymaster-General for the time being on behalf of the Court of Chancery, such sum of money as may be certified by the Lord Chancellor in writing to be required to pay the money so required to be paid, or to replace the securities so required to be transferred or delivered or make good such default."

Then by s. 6 it is provided that "Where under any Act (whether passed before or after the commencement of this Act), or otherwise, any money or securities would, if this Act had not passed, be capable of being paid, transferred, or deposited to or into or in the name of or to the account or credit of or with the privity of the Accountant-General of the Court of Chancery, or the Accountant-General of the Court of Exchequer, or to or into or in the Court of Chancery, the same shall after the commencement of this Act be paid, transferred, or deposited to the credit or account of or with the privity of the Paymaster-General for the time being on behalf of the Court of Chancery, and shall be subject to the like trusts, orders, directions, powers, and provisions as if he were the Accountant-General of the Court of Chancery or Court of Exchequer, as the case may be, and the orders of the Court of Chancery relating thereto shall have the same effect as the like orders of the Court of Chancery or Court of Exchequer would have had if this Act had not passed." Then, "All Acts of Parliament, all rules and orders made in pursuance of any Act of Parliament, all general orders of the Court of Chancery, all orders of the Court of Chancery, and all instruments and proceedings of every description referring to the Accountant-General of the Court of Chancery or Court of Exchequer, shall, subject to the provisions of this Act and of any

rule made thereunder, be construed and put into execution as if the Paymaster-General for the time being were therein named or referred to in place of such Accountant-General . . . ."

Then the same Act provides for the creation of the deposit account, for allowing suitors interest on the money placed on deposit, and then it provides by the latter part of s. 14, "The Consolidated Fund of the United Kingdom shall be liable to make good all money so placed in the hands of the Commissioners for the Reduction of the National Debt, and the interest payable on sums placed on deposit, in like manner as it is liable to make good money in Court."

Then by the Supreme Court of Judicature (Funds, &c.) Act, 1883, which constituted one accounting department for the Supreme Court of Judicature, it is provided that the funds and securities paid and transferred to the Paymaster-General shall be held by the Paymaster-General for the time being in trust to attend the orders of the Court in regard thereto, and that the Consolidated Fund shall be liable to make good to the suitors of the Court the moneys and securities so transferred, paid, or placed to the credit of the Paymaster-General.

The effect of these statutory provisions is that money and securities in Court are held in trust to attend the orders of the Court; that all acts done (including payments made) by the Paymaster-General under any order of the Court are protected, and are to be deemed valid and effectual; and, except so far as moneys and securities are paid and transferred under orders of the Court, and therefore protected, the Consolidated Fund is liable to make good to the suitors all moneys and securities.

Under the Settled Estates Act, 1856, s. 23, all moneys received from sales, or set aside as capital out of rents and royalties, are to be applied as the Court shall from time to time direct to some one or more of the purposes stated in the Act, which include the payment to any person becoming absolutely entitled. The Settled Estates Act, 1877, s. 34, contains a similar provision.

The moneys in question have already been paid away by the Paymaster-General, pursuant to an order of the Court, to the persons whom the judge considered to be absolutely entitled thereto. The Paymaster-General has not been "guilty of

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default." There has not been any misfeasance or carelessness or even any error whatever attributable to the Paymaster-General or any one under his superintendence. He has implicitly obeyed the order of the Court, and paid according to its tenor to the persons entitled to receive payment under the order. There has not been any slip of any kind, so far as he is concerned, nor has he been imposed upon in any way.

In the case of *In re Dangar's Trusts* (1) a slip was made in drawing up an order, in consequence whereof dividends were paid to a tenant for life on certain funds, to a portion of which she was not entitled, but which belonged to an infant, and the error was not discovered until after the death of the tenant for life. The infant, on attaining majority, presented a petition to the Court, and it was served on the Paymaster-General, but no relief was asked against him. In giving judgment Stirling J. said: "As regards the Paymaster-General, the petition is unfounded. I cannot find that he or his officials have been guilty of any neglect whatever. It was the Accountant-General, in those years, as the order was made before the recent Act of Parliament was passed, but, treating him as the Paymaster-General, he simply did what he was ordered to do: furnish a correct certificate upon the application made to him, and obey the order of the Court which dealt with the whole of the fund. It does not seem to me that he can be held liable in any way."

Thus, although money had been paid away, under an order of the Court, to the wrong person, the infant did not obtain repayment from the Treasury.

In *Jones* v. *Jones* (2) money had been paid out of Court to a wrong person, and an attempt was made to obtain payment out of the Consolidated Fund, and an application was made to the Lord Chancellor for a certificate that the Paymaster-General had been guilty of default. It appeared that one Fielding, who acquired the share in question, had obtained a stop order; he sold it to Gibbons, who did not obtain a stop order; but a slip was made in the office of the Accountant-General, and a certificate of the fund was issued which did not contain any notice of Fielding's stop order. This was the default alleged against the

(1) 41 Ch. D. 178, 186.

(2) [1901] 1 Ch. 464, n.

Paymaster-General; but Lord Cairns held that Gibbons should have obtained a stop order requiring notice to be given to himself, and as he had not done so he could not complain of any default as against him on the part of the Paymaster-General.

This case was followed by Kekewich J. in *Bath* v. *Bath* (1), where money had been paid to the wrong person, but the person who had acquired title to it was in default in not obtaining a stop order.

In the cases in which the Treasury have been held liable to make good out of the Consolidated Fund the amount paid to a wrong person the Paymaster-General has not been able to justify the payment actually made under any order of the Court.

Thus in *Slater* v. *Slater* (2), before Kay J. in 1888, payment was made under a forged power of attorney. The Paymaster-General had been deceived by the forgery and the payment was not made according to the tenor of the order.

Again in *Marsh* v. *Joseph* (3) the Paymaster-General had been deceived and had not paid as directed by the order. He had not paid to the person named, as a different person had been identified and the indorsement on the cheque forged. The Paymaster-General could not, therefore, justify that he had simply obeyed the order of the Court, and under these circumstances the claim to relief against the Treasury was not disputed.

Trustees who distribute a fund under the direction of the Court are exonerated from further liability; and the Court only holds and guards the funds under its control for the purpose of being ultimately paid to the persons whom it may judge entitled to the same. There may be cases in which the Court itself is imposed upon by fraud or forgery and the Paymaster-General in paying obeys the order of the Court, and in such cases it may be right to discharge the order so improperly obtained, and leave the matter as if no order had been made. But the present is not a case of that kind. Whatever rights the petitioner may have against her father's executrix or her aunt, who, it is alleged, have erroneously received between them her share of the funds in

(1) [1901] 1 Ch. 460. (2) [1897] 1 Ch. 222, n.
(3) [1897] 1 Ch. 213.

SWINFEN EADY J.
1910
WILLIAMS' SETTLED ESTATES, *In re.*

Court, and whatever rights she may have to be recouped out of the property remaining unsold, I am of opinion that this petition cannot be supported and must be dismissed.

The respondents intimating that in the circumstances they did not ask for costs, the petition was dismissed without costs.

Solicitors: *Gribble, Oddie, Sinclair, Rowlatt & Johnson, for T. W. Wilson, Walton-on-the-Naze; Treasury Solicitor; Atkey, Clarke & Atkey.*

G. R. A.

SWINFEN EADY J.
1910
July 26.

In re TRUMAN, HANBURY, BUXTON & CO., LIMITED.

[00223 of 1910.]

Company—Reduction of Capital—Publication of Reasons—Companies (Consolidation) Act, 1908 (8 *Edw.* 7, *c.* 69), *s.* 55.

Owing to the recent fall in the value of licensed properties a brewery company that had always had a credit balance to profit and loss and paid dividends found itself compelled to reduce its capital by a very large amount.

In sanctioning the reduction the Court ordered the company to publish a short memorandum of the reasons for the reduction and the causes which led to it for the information of the public under s. 55 of the Companies (Consolidation) Act, 1908.

PETITION for reduction of capital.

The above brewery company was incorporated in 1889. The authorized capital consisted of 2,215,000*l.* divided into 12,150 ordinary shares of 100*l.* each and 100,000 4 per cent. cumulative preference shares of 10*l.* each with priority as to dividend and capital.

The whole of the ordinary shares were issued to the partners in the old firm of Truman, Hanbury, Buxton & Co., the vendors to the company, credited with 75*l.* paid up, and were still held by them or their relatives. Another 20*l.* had been called up and paid, so that they were now 95*l.* paid up.

The preference issue was 50,000 fully-paid 10*l.* shares which were held by the public. The preference shareholders had no right to be summoned to or vote at ordinary or extraordinary

general meetings in respect of their shares except upon a question of alteration of the company's regulations directly affecting their rights, or of issuing capital with priority or equality to their shares, or to receive reports and balance-sheets.

Up to July, 1909, the company, besides making profits and paying dividends on both classes of shares, had accumulated a reserve of 288,063*l.*, which was invested in the business.

Among the assets appearing in the balance-sheet of July, 1909, the following items appeared :—

(*a*) Freehold and leasehold licensed properties (less depreciation)	£1,765,665
(*b*) Loans and estates in hand (less provision for doubtful accounts)	1,161,775
	£2,927,440

The latter item represented loans to customers and tenants upon mortgage of licensed properties, and licensed properties taken over on the failure of the borrowers to fulfil their obligations. Goodwill was not entered as an asset.

On a careful valuation of the above items made since the last balance-sheet, it was found that owing to the depression in the licensed victuallers' trade and the heavy fall in the value of licensed properties caused by the imposition of increased taxation culminating in the increased duties payable under the Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), there was an aggregate loss of upwards of 1,000,000*l.* on these two items.

The company proposed to write off 210,250*l.* from reserve and to reduce the capital by 789,750*l.* This was to be effected by reducing each ordinary share by 65*l.*, leaving the preference shares intact. The ordinary shares would thus become 35*l.* shares with 30*l.* paid up. The necessary resolutions having been passed and confirmed, this petition was presented by the company for confirmation of the reduction.

Cave, K.C., and *A. M. W. Wells*, for the company. The loss is clearly proved and there is no opposition.

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1910

TRUMAN, HANBURY, BUXTON & Co., LIMITED, *In re.*

off 1,000,000*l.* after having a credit balance to profit and loss and paying dividends for many years. Ought you not to publish the reasons for the reduction under s. 55 of the Companies (Consolidation) Act, 1908, with a view to give proper information to the public?]

The section is discretionary. The company is practically a private company with about a dozen ordinary shareholders. The preference shares are unaffected, and there being no public issue of ordinary shares, the public are not concerned in the matter.

SWINFEN EADY J. The petitioners have established their case for reduction of capital and shewn that it is necessary to write off 789,750*l.* from the ordinary shares and 210,250*l.* from reserve, the effect being that 1,000,000*l.* is written off. It often happens in cases which come before me that a sufficient allowance for depreciation has not been written off annually, but has been allowed to accumulate, and the deficiency is then dealt with by a reduction of capital. That does not apply to the present case, where special reasons for the reduction are given, and I think those reasons and the causes which have led to the reduction ought to be published under s. 55. It is not a case of a deficiency increasing year by year. There has always been a large credit balance to profit and loss, after a proper allowance for depreciation, and an annual distribution of dividend has been made, and suddenly this large loss occurs, and the capital has to be reduced. Sect. 55 provides that "In any case of reduction of share capital, the Court may require the company to publish as the Court directs the reasons for reduction, or such other information in regard thereto as the Court may think expedient with a view to give proper information to the public, and, if the Court thinks fit, the causes which led to the reduction."

I think this is essentially a case where there should be a short memorandum of the reasons for the reduction and the causes which led to it. It need only be a very short memorandum. It must be published in the same papers as the advertisements. It is not sufficient to say that there are only very few shareholders. The company has large dealings with the public, and the Act

contemplates proper information being given to the public, and not merely to the shareholders.

In accordance with this order the following notice was published in *The Times* of August 12, 1910, p. 2 e :—

In the matter of the Companies (Consolidation) Act 1908 and in the matter of Truman Hanbury Buxton & Co. Limited and Reduced.

Notice is hereby given that the Order of the High Court of Justice (Chancery Division) dated the 26th day of July 1910 confirming the reduction of the capital of the above named company from 2,215,000*l.* to 1,425,250*l.* and the Minute (approved by the Court) showing with respect to the capital of the company as altered the several particulars required by the above mentioned Act were registered by the Registrar of Joint Stock Companies on the 5th day of August 1910.

And notice is hereby also given pursuant to the said Order and to section 55 of the above mentioned Act that the reason for the reduction of the capital of the company is the loss of upwards of 1,000,000*l.* of the capital value of the assets of the company by reason of the depreciation in value of freehold and leasehold licensed properties of the company and of licensed properties upon the security of which moneys of the company have been advanced and that such depreciation has been caused by the imposition of increased taxation culminating in the increased duties payable under the provisions of the Finance (1909-10) Act 1910.

And notice is hereby also given that the said Minute is in the words and figures following :—

"The capital of Truman Hanbury Buxton & Company Limited and Reduced is henceforth 1,425,250*l.* divided into 12,150 ordinary shares of 35*l.* each and 100,000 preference shares of 10*l.* each instead of the former capital of 2,215,000*l.* divided into 12,150 ordinary shares of 100*l.* each and 100,000 preference shares of 10*l.* each. At the time of the registration of this Minute the whole of the said ordinary shares numbered 1 to 12,150 inclusive and 50,000 of the said preference shares numbered 1 to 50,000 inclusive have been issued. The sum of 30*l.* has been paid and is to be deemed to be paid up on each of the said ordinary shares and the sum of 10*l.* has been and is to be deemed to be paid up on each of the said issued 50,000 preference shares. The remaining 50,000 preference shares have not been issued and nothing has been or is to be deemed paid up thereon."

Dated the 10th day of August 1910.

ASHURST MORRIS CRISP & Co. 17 Throgmorton Avenue London E.C.
Solicitors for the Company.

Solicitors : *Ashurst, Morris, Crisp & Co.*

G. R. A.

C. A.
1910
May 30, 31 ;
June 1, 2, 3, 6 ;
July 5.

BRITISH SOUTH AFRICA COMPANY *v.* DE BEERS CONSOLIDATED MINES, LIMITED.

[1906 B. 2882.]

Conflict of Laws—Contract—Proper Law — Immovables — Contract to issue Debentures — Floating Charge on Foreign Land — Clog on Equity of Redemption.

An English contract to give a mortgage on foreign land, although the mortgage has to be perfected according to the lex situs, is a contract to give a mortgage which, inter partes, is to be treated as an English mortgage subject to such rights of redemption and other equities as the law of England regards as necessarily incident to a mortgage.

The equitable rule against clogging the equity of redemption of a mortgage applies to an English contract for an issue of debentures to secure a loan, and will be enforced against a contracting party in the jurisdiction although the floating security to be created by the debentures comprises foreign land where the clog doctrine is possibly not recognized.

Decision of Swinfen Eady J., [1910] 1 Ch. 354, affirmed.

Appeal from a decision of Swinfen Eady J. (1)

The Royal Charter under which the plaintiff company was incorporated, the agreements of April 20 and December 7, 1892, the trust deed of June 27, 1894, and the facts, are given in great detail in the report of the case in the Court below, and the following summary and statement of the material portions of the agreement of December 7, 1892, on which the case turned (taken from the judgment of Cozens-Hardy M.R.) is sufficient for the purposes of this report.

The plaintiffs were a chartered company with express powers to borrow money on debentures or other obligations, and to make concessions of mining or other rights and to grant leases for terms of years or in perpetuity, and either absolutely or by way of mortgage or otherwise. The defendant company was a limited company registered and incorporated in Cape Colony, but having an office in London. On April 20, 1892, an agreement was made between the plaintiff company of the one part

(1) [1910] 1 Ch. 354.

and the defendant company of the other part, under which a sum of 112,000*l.* advanced, and to be advanced, by the defendants to the plaintiffs was to be secured. The 112,000*l.* was to be repaid in London.

It is not necessary to consider this agreement more in detail because no right under it was now claimed, but it formed part of the history of the transaction.

By an agreement made on December 7, 1892, between the same parties, described as supplemental to the principal agreement of April 20, 1892, after reciting that the defendants had advanced 112,000*l.* to the plaintiffs and that the plaintiffs contemplated an issue of first mortgage debentures for 750,000*l.*, and had applied to the defendants to accept an issue at par of first mortgage debentures, part of such issue, in payment or satisfaction of the 112,000*l.*, and to lend a further sum of 100,000*l.* to be secured by an issue at par of first mortgage debentures, further part of the said issue, and that the defendants had agreed to the said request and application on the terms therein mentioned, it was provided by clauses 1 and 2 that upon the mortgage debenture issue being made the plaintiff company should allot and issue to the defendant company first mortgage debentures, part of such issue, of the nominal value of 112,000*l.* By clause 3 the first mortgage debentures and interest at 6 per cent. were to be secured by a floating charge upon the entire assets and undertaking of the company. By clause 4 the allotment and issue of debentures for the nominal value of 112,000*l.* was to be in full discharge for the 112,000*l.* and interest. By clause 5 provision was made for the further advance of 100,000*l.* by certain instalments, and clause 6 was in the following terms:—"In consideration of the assistance rendered and to be rendered by the defendant company to the plaintiff company as appearing in the principal agreement and this agreement the plaintiff company shall grant the defendant company exclusive licence to work all the diamondiferous ground to which the plaintiff company is or may become entitled in the territories to which it now is or may become entitled or in which it now carries on or may carry on operations, whether north or south of the river Zambesi, such exclusive licence to be at the

C. A. 1910 — BRITISH SOUTH AFRICA COMPANY v. DE BEERS CONSOLIDATED MINES, LIMITED.

same royalty and on the same conditions as diamondiferous ground is now worked in the Du Toits Pan and Bultfontein Mines, the property of the London and South African Exploration Company, Limited, save that besides the above royalty the defendant company shall pay to the plaintiff company 2 per cent. on the gross receipts the defendant company may derive on sale of diamonds acquired under this provision or on the terms of the principal agreement. Provided, nevertheless, that the defendant company shall be at liberty to determine at any time within two years after any alleged diamond mine is discovered to disclaim the benefits and obligations of this clause in so far as respects any such alleged diamond mine." The conditions referred to in clause 6 provided for the renewal of the licence every five years in perpetuity by paying a 10*s.* fine.

On June 27, 1894, the plaintiff company executed a trust deed to secure an issue of 250,000*l.* mortgage debentures and 500,000*l.* mortgage debenture stock, all ranking pari passu. According to the terms of this deed the principal and interest were made payable in London, but at the request of the holder payment of the interest might be made in the Cape Colony. Neither of the two agreements of 1892, nor the trust deed of 1894, was registered in Rhodesia, and in the absence of such registration no effective security on real estate in Rhodesia was created. Pursuant to the terms of the agreement of December, 1892, debentures to the amount of 212,000*l.* were issued in London to the defendants. They were subsequently sold by the defendants, and were paid off by the plaintiffs before 1896. In these circumstances the defendant company contended that clause 6 was a valid agreement. The plaintiff company, on the other hand, alleged that clause 6 was inoperative and of no legal validity. All the documents referred to above were executed in London. Northern Rhodesia is governed by English law; Southern Rhodesia by Roman-Dutch law.

The plaintiff company had diamondiferous grounds of very considerable value, and the defendant company claimed to be entitled to the grant of an exclusive licence to work them all. The plaintiff company's view was that, as all the money was paid off, the agreement no longer bound them. As, however,

the defendant company still claimed to be entitled to an exclusive licence under the agreement of December 7, 1892, the plaintiff company brought this action for a declaration that the two agreements of 1892, in so far as they purported to confer on the defendant company the right to the grant by the plaintiff company of an exclusive licence to work diamondiferous ground in the plaintiff company's territories, were ultra vires the plaintiff company and void; alternatively a declaration that the stipulations in the said agreements, so far as they purported to entitle the defendant company to the grant of such exclusive licence after payment off of all sums advanced in pursuance of the agreements, were not binding in equity on the plaintiff company; and alternatively a declaration that upon the true construction of the agreements the defendant company was entitled to such exclusive licence only so long as any moneys remained due to the defendant company thereunder, and that it was not now entitled to the grant of such exclusive licence.

The defendant company counterclaimed specific performance of the agreements.

Swinfen Eady J., in a considered judgment, held that the prohibition in the charter had no application to the exercise by the plaintiff company of their proprietary rights, and therefore that the agreement to grant an exclusive licence to the defendant company was not void as being ultra vires, but that the agreement to grant the exclusive licence was part of the mortgage transaction under which the debentures were issued to the defendants, and that it was invalid on that ground as being a clog on the equity of redemption. His Lordship in the result held that the plaintiff company were entitled to a declaration in accordance with their claim, but without costs, and that the counter-claim must be dismissed with costs.

The defendant company appealed. The appeal was heard on May 30, 31, June 1, 2, 3, and 6, 1910.

As it became unnecessary in the view taken by the Court of Appeal to express any opinion upon the different views of the expert witnesses upon Roman-Dutch law, all reference to them and to the arguments founded upon them is omitted.

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Upjohn, K.C., Jenkins, K.C., and *J. W. M. Holmes*, for the appellants. The grounds on which this appeal is based are (1.) that the clog doctrine, as it is called, does not apply to this transaction at all, but if it does, then (2.) it does not apply to the lands in Southern Rhodesia which are governed by Roman-Dutch law, and the law to be applied in respect of those lands is Roman-Dutch, not English law. (3.) Having regard to the fact that there has been no registration of any debenture or trust deed, constituting any charge upon the lands in Southern Rhodesia, there is no effective mortgage or charge on those lands, and therefore the clog doctrine cannot apply. (4.) On the evidence as to Roman-Dutch law it is clear that there is no such doctrine as clogging the equity of redemption as part of that law.

The agreement of December 7, 1892, was not a mortgage of the kind to which the clog doctrine has ever been applied, a doctrine too that is not to be extended: *Samuel* v. *Jarrah Timber and Wood Paving Corporation.* (1) The debentures create a floating security, and the mortgage is to trustees and not to the defendants direct, and no day certain is fixed for payment. The issue of debenture stock is not borrowing: *City of London Brewery Co.* v. *Inland Revenue Commissioners.* (2) The true meaning of the clog doctrine and the result of the cases is as follows. It is a rule which prevents the creation, as part of a mortgage transaction, either of any condition preventing the mortgagor from redeeming the mortgage, and so recovering his estate, or the creation of any estate, right, or interest in the mortgage to continue after the discharge of the mortgage in the mortgaged property. That rule is primarily a rule of property law, and produces an incapacity on the part of the mortgagor to enter into any contract or dealing with his property so as to produce an effect contrary to this rule, i.e., an incapacity to contract similar to that in the case of *Bank of Africa* v. *Cohen.* (3) It is a rule too that relates to rights, interests, and titles in and to property.

[In support of the above counsel cited or referred to *Santley* v. *Wilde* (4), *Casborne* v. *Scarfe* (5), *Jennings* v. *Ward* (6), *Noakes & Co.*

(1) [1904] A. C. 323.
(2) [1899] 1 Q. B. 121.
(3) [1909] 2 Ch. 129.
(4) [1899] 2 Ch. 474.
(5) (1737) 1 Atk. 603.
(6) (1705) 2 Vern. 520.

v. *Rice* (1), *Reeve* v. *Lisle* (2), *Bradley* v. *Carritt* (3), *Browne* v. *Ryan* (4), *Biggs* v. *Hoddinott* (5), *Mainland* v. *Upjohn* (6), and *Samuel* v. *Jarrah Timber and Wood Paving Corporation*. (7)]

The clog doctrine can only have effect where it is part of the lex rei sitæ, and if the law of the country where the land is situate does not contain this doctrine, a mortgagor cannot get the benefit of it by finding his defendant in England and bringing his action there.

With regard to land and immovables the lex rei sitæ prevails in regard to all rights, interests, and titles in and to such property; the law on this point is correctly stated by Kennedy L.J. in *Bank of Africa* v. *Cohen*. (8)

The law governing immovables is discussed in Story's Conflict of Laws, 8th ed., ch. 10, ss. 424, 430, 431, 445, 463, and in Dicey on the Conflict of Laws, 2nd ed. p. 500, ch. 23, rule 141, pp. 502, 510, 572, rule 154, and note 17 to appendix, pp. 810 to 812; Westlake's Private International Law, 2nd ed., ch. 8, ss. 156, 202.

The proper law of this contract is Roman-Dutch law, which does not recognize the clog doctrine.

The parties must have intended Roman-Dutch law to govern the contract if clause 6, which is bad by English law, is valid by Roman-Dutch law. The parties may intend different laws to apply to different parts of the contract: *In re Fitzgerald* (9); *Chamberlain* v. *Napier* (10); and clause 6 must be construed by the law of the country under which the land is held. The proper law of the contract is that which the parties must be presumed to have had in mind as the law under which their rights were to be worked out and effected under the contract: *Lloyd* v. *Guibert*. (11) *Hamlyn & Co.* v. *Talisker Distillery* (12) shews that there is no difficulty in splitting the terms of such a contract, and that one system of law may apply to one part and another

(1) [1900] 1 Ch. 213; [1900] 2 Ch. 445; [1902] A. C. 24.
(2) [1902] A. C. 461.
(3) [1903] A. C. 253.
(4) [1901] 2 I. R. 653.
(5) [1898] 2 Ch. 307.
(6) (1889) 41 Ch. D. 126.
(7) [1904] A. C. 323.
(8) [1909] 2 Ch. 146.
(9) [1904] 1 Ch. 573.
(10) (1880) 15 Ch. D. 614.
(11) (1865) L. R. 1 Q. B. 115.
(12) [1894] A. C. 202.

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system of law to another. If the result of applying one system of law is to destroy and the result of applying another system of law is to give effect to the contract, that is a reason for choosing the latter system: *In re Missouri Steamship Co.* (1) For this the contract itself must be looked at: *Jacobs* v. *Crédit Lyonnais.* (2) Swinfen Eady J. was therefore wrong in holding that English law only was to be applied in construing this contract.

This Court has power by virtue of its jurisdiction in personam to enforce this contract according to the true intention of the parties in respect of land out of the jurisdiction. [*Deschamps* v. *Miller* (3), *Ex parte Pollard* (4), *Ex parte Holthausen* (5), *Mercantile Investment and General Trust Co.* v. *River Plate Trust Loan and Agency Co.* (6), *Ewing* v. *Orr Ewing* (7), *Lord Cranstown* v. *Johnston* (8), Dicey on the Conflict of Laws, 2nd ed. pp. 204, 205, *Norton* v. *Florence Land and Public Works Co.* (9), *Norris* v. *Chambres* (10), *Paget* v. *Ede* (11), *Toller* v. *Carteret* (12), and *Bent* v. *Young* (13) were cited and criticized.] The true explanation of these cases is that they do not fall within any question of the law which governs the transaction; they are based upon assuming jurisdiction in personam against a person within the jurisdiction against whom there is an independent cause of action, contract, tort, or equity, and then the relief given is to order him to make the conveyance or give the mortgage in accordance with the law of that foreign country; but if it appears that the law of the foreign country does not allow that to be done which the plaintiffs want to be done, then the Court will not exercise the jurisdiction. [*Waterhouse* v. *Stansfield* (14) was also cited.]

To sum up. (1.) The clog doctrine directly affects estates,

(1) (1889) 42 Ch. D. 321.
(2) (1884) 12 Q. B. D. 589.
(3) [1908] 1 Ch. 856.
(4) (1840) Mont. & Ch. 239; 4 Deac. 27.
(5) (1874) L. R. 9 Ch. 722.
(6) [1892] 2 Ch. 303.
(7) (1883) 9 App. Cas. 34.
(8) (1796) 3 Ves. 170.
(9) (1877) 7 Ch. D. 332.
(10) (1861) 29 Beav. 246; 3 D. F. & J. 583.
(11) (1874) L. R. 18 Eq. 118.
(12) (1705) 2 Vern. 494.
(13) (1838) 9 Sim. 180.
(14) (1851) 9 Hare, 234; (1852) 10 Hare, 254.

rights, and interests in the property in question, an immovable property, and therefore the application of it must depend, in accordance with the authorities above referred to, on the lex situs; this clog doctrine cannot be applied to land where the lex loci does not include that doctrine. (2.) The agreement of December, 1892, being first an agreement for security and secondly an agreement for a lien on immovable property, must, in the absence of plain expressions to the contrary, be governed by the lex situs. In this way you get to the lex situs as governing the contract on two distinct grounds, upon either of which this appeal can be allowed.

Levett, K.C., *W. E. Hollams*, and *G. H. Allen*, for the respondents. There are two questions: (1.) Is this clause void because it is a clog on the equity of redemption? (2.) Is it void because it is ultra vires? As to the first point, this is an English contract to be governed by English law. It is made in England by an English company; it is in English form; it contemplates the issue of debentures to be secured by a floating charge, which is an English form of security; and the debentures are payable in England. It includes property in Northern Rhodesia which is subject to English law and property in Southern Rhodesia which may be subject to Roman-Dutch law, and that is the only fact which causes any difficulty. But this contract gives no real right to land in Southern Rhodesia; it gives merely a right in personam which could only be enlarged into a right in rem by judicial proceedings, and in considering the effect of the contract the lex situs has no application. It is not disputed that the question of capacity to enter into a contract relating to immovables is governed by the lex situs, as was held in *Bank of Africa* v. *Cohen* (1), but that has no bearing on this case. The effect of a contract as to immovables is governed by the proper law of the contract, and the proper law of the contract is the law by which the plaintiffs intended, or may fairly be presumed to have intended, the contract to be governed. This being an English contract, so far as there is no incorporation of foreign law, it is governed by English law, and the lex situs cannot be brought in inferentially because a particular clause applies to land in different

(1) [1909] 2 Ch. 129.

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countries. This is one indivisible contract, and in determining what is the proper law it must be looked at as a whole; the fact that one clause in that contract deals with English land and Roman-Dutch land is not a reason for giving to that clause a double meaning and saying that in England that clause has one proper law for the English land and another proper law for the Roman-Dutch land. Of course, a particular clause may have a separate proper law where that is expressly provided or is necessarily implied from the language used, but that is different from saying that where one clause has two subject-matters, which have different local laws, it is to be governed by different laws according to the subject-matter. The proper law of the contract is not so divisible. If this is, as we contend, one entire contract, which carries with it from its inception an absolute right of redemption, this Court will act upon its own rules and will not trouble itself about what is the effect of redemption in foreign countries. This is illustrated by *Beckford* v. *Kemble*. (1) The text-books are in substantial agreement and support this view of the law: Dicey's Conflict of Laws, 2nd ed. pp. 201, 203, 500, 510, 529; Westlake's Private International Law, 4th ed. pp. 210—214, 285.

[KENNEDY L.J. referred to Foote's Private International Jurisprudence, 3rd ed. pp. 200, 201].

The authorities shew that prima facie the proper law of the contract is the law of the country where the contract is made, and that it is for the other side to displace that presumption: *Peninsular and Oriental Steam Navigation Co.* v. *Shand* (2); *Lloyd* v. *Guibert* (3); *Chamberlain* v. *Napier* (4); *Jacobs* v. *Crédit Lyonnais* (5); *In re Missouri Steamship Co.* (6); *Campbell* v. *Dent* (7); *Lord Cranstown* v. *Johnston* (8); *Ex parte Pollard* (9); *Cood* v. *Cood* (10); *Ex parte Holthausen.* (11)

Assuming that the Roman-Dutch law applies to this contract,

(1) (1822) 1 S. & S. 7.
(2) (1865) 3 Moo. P. C. (N.S.) 272.
(3) L. R. 1 Q. B. 115, 126.
(4) 15 Ch. D. 614.
(5) 12 Q. B. D. 589, 600.
(6) 42 Ch. D. 321, 336.
(7) (1838) 2 Moo. P. C. 292.
(8) 3 Ves. 170; (1800) 5 Ves. 277.
(9) Mont. & Ch. 239.
(10) (1863) 33 Beav. 314, 322.
(11) L. R. 9 Ch. 722, 727.

it has never been decided that a clog on the equity of redemption is good, and upon the evidence the position in South Africa appears to be much the same as it was here in the last century before the question was finally settled by *Noakes & Co.* v. *Rice.* (1) It was not that the House of Lords made law, but they told us the law which we did not know. The Roman-Dutch law differs from our law in allowing the mortgagee to buy at a fair price, but, on the other hand, by the Constitution of Constantine the mortgagor is not to lose his estate if he makes default, and in one respect a mortgagor in South Africa is better off than he is here, because there a power of sale cannot be exercised without the intervention of the Court. The object of our maxim "Once a mortgage always a mortgage" was to protect the mortgagor against the assumed authority of the mortgagee, and the Roman-Dutch law carries out the same principle. The better view is that even by Roman-Dutch law this transaction would not be good.

As to the second point, clause 6 is ultra vires because it is a grant of a monopoly which is obnoxious to article 20 of the charter of incorporation; and, if that is so, the chartered company is in the same position as any ordinary statutory company. The learned judge below attributed to the word "monopoly" in this charter the meaning given to it by Sir Edward Coke in the 3rd Institute, folio 181; but "monopoly" is not and cannot be used here in the sense of a grant by the King of a particular right, but is used in its popular sense, and means that the chartered company is not to concentrate one whole industry in one individual. The intention was to prevent an agreement like this, which is to grant an exclusive licence to all the diamondiferous ground which the chartered company may become entitled to.

[COZENS-HARDY M.R. We think you are wrong as to that.]

Upjohn, K.C., in reply, after criticizing and distinguishing the cases relied on by the respondents, cited *Heath* v. *Pugh* (2) and *Harrison* v. *Harrison.* (3)

Cur. adv. vult.

(1) [1902] A. C. 24.
(2) (1881) 6 Q. B. D. 345; (1882) 7 App. Cas. 235.
(3) (1873) L. R. 8 Ch. 342.

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July 5. COZENS-HARDY M.R. The question in this appeal is as to the right of the De Beers Company to an exclusive licence to work all diamondiferous ground of the British South Africa Company in either Northern Rhodesia or Southern Rhodesia. [His Lordship, having stated the facts and the material portions of the agreement of December 7, 1892, as above, continued :—]

Now it seems to me reasonably plain, as a matter of construction, that the 212,000*l.* advanced by the defendants to the plaintiffs was advanced on a contract to give security, and that there was no separate consideration for clause 6 nor anything which enables the Court to say that that clause must be regarded as an entirely separate and independent obligation. This being so, it was not very strenuously argued that, according to English law, clause 6 could be relied upon. The authorities in the House of Lords to which our attention was called seem to me to establish this beyond all dispute. In the view of our law it is inconsistent with the very idea of a mortgage that on payment off of the mortgage debt the mortgagee should retain for his own benefit any part of, or any interest in, the mortgaged property. This principle applies whether the mortgage is legal or equitable and whether the property mortgaged is real or personal. It seems to me to be a highly sensible principle, and not to deserve the prejudice which it is sought to attach to it by using the term "clog on the equity"—a phrase which is not strictly applicable to the present case. For a mortgagee to claim a right after the mortgage debt has been paid off to retain in perpetuity all the valuable minerals in the mortgaged land is something more than a clog. But it is urged that this is a doctrine peculiar to English law, and is not to be found in Roman-Dutch law, by which, it is urged, the rights of the defendants in Southern Rhodesia ought to be governed.

It is necessary in the first place to consider what is the proper law of the contract. I think the proper law is English. I arrive at this conclusion on several grounds. The contract was executed in London. It is in English form. The trust deed under which the debentures were issued, which were accepted by the defendants as satisfying the obligations of the plaintiffs under the agreement, made the principal money payable in London,

and in a mortgage the debt is the principal thing and the security is merely an adjunct or accessory to the debt. The language used in the agreement, and the form of the securities, are familiar to all English lawyers, and without saying that the term "floating charge" is unknown in Roman-Dutch law, as to which there is no evidence, I think the language used strongly confirms the prima facie rule that the law of the place where the contract was executed is the proper law: see *Peninsular and Oriental Steam Navigation Co.* v. *Shand.* (1) I attach also considerable importance to the fact that the floating charge is given by clause 3 upon all the property of the plaintiffs, whether in England, in Northern Rhodesia, or in Southern Rhodesia, and that clause 6, upon which the question turns, deals with all the territories of the plaintiffs. It is to my mind extremely difficult to suppose that the proper law can be severed in this sense, that as to part of the property it is British law and as to the rest of the property it is Roman-Dutch law. I have not forgotten the argument that the parties must have intended Roman-Dutch law to govern the contract if clause 6, which is bad by English law, is valid by Roman-Dutch law, but that consideration is not in the present case of much weight. The parties obviously did not know the English law, and they are not likely to have been better instructed in the Roman-Dutch law.

But assuming that the proper law of the contract is English, it still remains to consider whether it is part of the English law that the security agreed to be given upon land in Southern Rhodesia should be governed by the lex situs. In my opinion the contract did not create any more than a personal right, as distinct from a real right, a right which the Courts of this country would enforce in personam. For centuries the Court of Chancery has, by virtue of its jurisdiction in personam, applied against parties to a contract or trust relating to foreign land the principles of English law, although the lex situs did not recognize such principles. The judgment of Lord Alvanley in *Lord Cranstown* v. *Johnston* (2) asserts this in very strong language: "With regard to any contract made or equity between persons in this country respecting lands in a foreign country,

(1) 3 Moo. P. C. (N.S.) 290. (2) 3 Ves. 170, 182.

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particularly in the British Dominions, this Court will hold the same jurisdiction, as if they were situated in England." The language of Lord Cottenham in *Ex parte Pollard* (1) is equally strong: "It is true that in this country contracts for sale, or (whether expressed or implied) for charging lands, are in certain cases made by the Courts of Equity to operate in rem; but in contracts respecting lands in countries not within the jurisdiction of these Courts they can only be enforced by proceedings in personam, which Courts of Equity here are constantly in the habit of doing: not thereby in any respect interfering with the lex loci rei sitæ. If indeed the law of the country where the land is situate should not permit or not enable the defendant to do what the Court might otherwise think it right to decree, it would be useless and unjust to direct him to do the act; but when there is no such impediment the Courts of this country, in the exercise of their jurisdiction over contracts made here, or in administering equities between parties residing here, act upon their own rules, and are not influenced by any consideration of what the effect of such contracts might be in the country where the lands are situate, or of the manner in which the Courts of such countries might deal with such equities."

To take a simple case, if A. by an English contract agreed to give a mortgage to secure an English debt upon land in a foreign country, the law of which country does not recognize the existence of what we call an equity of redemption, which was the case of our common law, and if a mortgage was given and duly perfected according to the lex situs, I feel no doubt that our Courts would restrain the mortgagee from exercising the rights given by the foreign law and would treat the transaction as a mortgage in the sense in which that word is used by us. In doing this our Courts would not in any way interfere with the lex situs, but would by injunction, and if necessary by process of contempt, restrain the mortgagee from asserting those rights. Similar observations would apply to a trustee, if the lex situs does not recognize trusts.

It is laid down by Mr. Westlake in paragraph 216 that contracts relating to immovables are governed by their proper law as

(1) Mont. & Ch. 250.

contracts, so far as the lex situs of the immovables does not prevent their being carried into execution. If that proposition is well founded it is decisive of the present case. It is approved by Mr. Foote at p. 201 of his book.

In my opinion an English contract to give a mortgage on foreign land, although the mortgage has to be perfected according to the lex situs, is a contract to give a mortgage which—inter partes—is to be treated as an English mortgage and subject to such rights of redemption and such equities as the law of England regards as necessarily incident to a mortgage. It follows that I think Swinfen Eady J.'s judgment on this point was perfectly right. In the view which I take it is not necessary to express any opinion upon the different views of the expert witnesses on Roman-Dutch law, or upon the other points which the learned judge decided against the plaintiffs. The appeal must be dismissed with costs.

FARWELL L.J. A great number of points have been argued in this case, but as I entirely agree with Swinfen Eady J., it is unnecessary for me to refer to any except those on which he decided the case. The first question is, In accordance with what law is the agreement of December 7, 1892, to be construed? It is common ground that the agreement of April 20, 1892, was not acted on, and it is only material as shewing that from the commencement the lease or licence was contingent on, and part of, the consideration for subscriptions to the plaintiffs' debentures by the defendants (see clause 4). I am of opinion that the agreement of December 7, 1892, must be construed according to English law, not only because it is made in England, relating to a charge to be created in England by an English company on all its assets by the familiar English methods of floating security with English trust deed and debentures in English form with English trustees, to be executed and issued respectively in England, but, further than that, it is a bargain by a company proposing to subscribe for part of the English issue of debentures by an English company for the purpose of securing a special advantage to such company as part of the consideration for the advance by them of part of such issue. Again, the transaction

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is primarily an agreement for security, and whatever be the security for an advance, the theory of our law, as settled by the intervention of the Court of Chancery following the civil law, is that "when a mortgage is executed, the debt intended to be secured by it, is considered to be the principal, and the securities are considered as adjuncts, depending, for their existence, on the existence of the debt": Co. Litt. 205a, Butler's note. It follows that, in considering a mortgage or charge, the nature of the property charged is of little (if any) importance: the transaction is primarily a personal transaction, and the fact that all or part of the security is real estate abroad is only material as necessitating the observance of the foreign law in the instruments creating the charge. In this case the charge covers the entire property of the Chartered Company real and personal in England and in Africa, and of the land in Africa part is governed by English and part by Roman-Dutch law. There is only one security, and the same law applies to the whole. Then if this is an English contract it is clear that the lease or licence is agreed to be given in consideration of the 112,000*l.* repaid and again advanced as part of the 750,000*l.* debentures and the agreement by the De Beers Company to make a further advance of 100,000*l.* and take 100,000*l.* further part of the proposed issue of 750,000*l.* as security therefor. It is said that this is not a clog on the equity of redemption because the debentures create a floating security, and because the mortgage is to trustees and not to the defendant company direct, and because no day certain is fixed for repayment, and because it is said that the doctrine of the clog is not to be extended. In my opinion there is no substance in any of these contentions, as is apparent when the meaning of the clog doctrine is considered. That doctrine is merely a corollary to, or perhaps I should call it a figurative but forcible way of stating, the general rule that on repayment of all that is properly payable on the security of the property charged the whole of that property must be restored to the borrower, unfettered and undiminished by anything created in favour of the lender as part of the consideration of the loan. The corollary applies to all cases where there is a right to redeem, and is incident to or part of that right. The sole question is, Is there a right

to redeem? Lord Macnaghten expresses the rule thus in *Noakes & Co.* v. *Rice* (1): "It is inherent in the thing itself. And it is, I think, as firmly settled now as it ever was in former times that equity will not permit any device or contrivance designed or calculated to prevent or impede redemption. It follows as a necessary consequence that, when the money secured by a mortgage of land is paid off, the land itself and the owner of the land in the use and enjoyment of it must be as free and unfettered to all intents and purposes as if the land had never been made the subject of the security." It would be idle to contend that in a mortgage by trustees to raise portions, containing, as is usual in such a case, no covenant by themselves to pay, the mortgagees could create a clog on the equity of redemption, or that in a contributory mortgage to two or more persons, or to trustees for them to secure a sum advanced by them pari passu, one of such lenders could stipulate for a beneficial lease to himself continuing after redemption as part of the consideration for his advance. Whether the doctrine be well or ill founded, it is too well settled to be disturbed, and I confess that in my eyes it has in the present case the merit of preventing one of the general body of debenture-holders, all of whom were apparently subscribing on the same footing, from obtaining an advantage to themselves in diminution and at the expense of the security intended for all equally. In the present case no injury has been done to the other debenture-holders, as all have been paid off, but it is obvious that such bargains might operate very unjustly, if they are to be supported.

Then it is said that our Courts must apply the lex situs to the land in Southern Rhodesia, and this is true to the extent that our judgment cannot directly affect land out of the jurisdiction. But the jurisdiction in personam is too well settled to need discussion: the case comes before us on a claim for specific performance, and it is quite plain, as Lord Cottenham says in *Ex parte Pollard* (2), that our Courts "in the exercise of their jurisdiction over contracts made here, or in administering equities between parties residing here, act upon their own rules, and are not influenced by any consideration of what the

(1) [1902] A. C. 24, 30.
(2) Mont. & Ch. 239, 250.

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effect of such contracts might be in the country where the lands are situate, or of the manner in which the Courts of such countries might deal with such equities." Here the Court is dealing with an English contract to give a charge on property, which includes some foreign property: such a charge must be one in accordance with English law and must not contravene any principle of justice adopted here: in settling a charge in such a case the Court would no more allow the insertion of a clog on, than it would allow the total elimination of, the power to redeem. The same principle on which the Court of Chancery acting in personam compelled the mortgagee whose estate had become absolute at law to treat it as a security only and to restore it on payment in full of all that was due enables this Court to compel the mortgagee of foreign land under an English contract to mortgage to treat such land as a security only and redeemable on the terms which this Court considers equitable. It is unnecessary for me to express any opinion on the Roman-Dutch law, and in the face of the conflicting opinions of the experts it would be difficult to come, nor have I come, to any satisfactory conclusion. I express no opinion on the question of ultra vires dealt with by Swinfen Eady J., as it is unnecessary to do so: it is plain to my mind that the lease or licence mentioned in clause 6 is not "a monopoly of trade" within the charter: the nature and powers of the company were such that they might find themselves in a position to grant a monopoly of trade in much the same way as the Crown by its prerogative has power to do, but such a monopoly is quite distinct from the rights of exclusion of others arising from the sole ownership of land. The owner of a village may refuse to let any house in it to be used as a butcher's shop, but he cannot grant a monopoly of the butcher's trade; the effect may be the same, but the former is the exercise of his right of property, the latter is an attempt to exercise the Royal prerogative.

I agree that the appeal should be dismissed with costs.

KENNEDY L.J. In this case the plaintiff company's impeachment of the validity of clause 6 of the agreement of December, 1892, on the ground that it purports to grant a monopoly of

trade contrary to clause 20 of the defendant company's charter and was ultra vires was held by Swinfen Eady J. in the Court below to have failed.

In this Court we have heard no argument on the question of ultra vires, because, as the Court after hearing the respondents' counsel was unanimous in its opinion that the judgment under appeal was right in holding that the agreement in question did not purport to confer upon the defendant company a monopoly of trade forbidden by the charter, it was unnecessary to consider the question of ultra vires.

The other question in the case is whether or not this sixth clause is, as the plaintiff company asserts, unenforceable by reason of the applicability of the English equitable rule or doctrine against clogging the equity of redemption. In regard to this question, two points are involved, on both of which the plaintiff company was held by Swinfen Eady J. to be entitled to succeed. The plaintiff company contends that, as a matter of construction, the nature of the agreement is such that to use this clause 6, which is portion of it, as the defendant company seeks to use it, after the debentures have been paid off, would be to give effect to a stipulation which, so applied, operates in a way which in the view of an English Court of Equity is a forbidden way; and, further, that, even if it were proved, in regard to the lands of the plaintiff company south of the Zambesi (in Northern Rhodesia, it is admitted, the law is English law), that the Roman-Dutch law, which there prevails, does not recognize this English equitable doctrine of the clog, it is the law of this country, the lex loci contractus, and not the lex loci rei sitæ, which ought to be held in the present litigation to govern the rights of the parties to the agreement.

Upon the question of fact which underlies the second of these two points Swinfen Eady J. has given no decision. He has not decided whether or not, upon the evidence, the defendant company has proved that the doctrine of the clog has no place in the Roman-Dutch law prevailing in Southern Rhodesia. It was unnecessary for the learned judge to deliver a finding upon this issue, because he held as a matter of law that the rights of the parties in this litigation were governed wholly by English law.

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My own view is that on the issue of fact the defendant company has by preponderating evidence made out its contention that, in the language of the Attorney-General of the Cape Colony, there is under Roman-Dutch law no reason whatever why the pact in regard to the exclusive licence for getting diamonds should be held to cease simply on payment of the debenture debt, the pact holding good whether attached to a mortgage or simply a pact in connection with a loan. The sum of the evidence of Mr. Nathan, on which the plaintiffs chiefly rely, is, so far as I can draw any conclusion from his deposition and lengthy cross-examination read as a whole, that in his opinion the principles of Roman-Dutch law are in harmony with a probable or possible development towards the recognition of the English equitable doctrine in regard to clogging the equity of redemption. But this evidence is not enough: we have to deal with the law of a colony or of a foreign country as it is, not to speculate upon its possible or probable developments.

This result of the evidence as to the Roman-Dutch law affecting Southern Rhodesia is, however, of no service to the defendant company, if the dispute under the contract between the parties, in regard to the present litigation, ought, as the plaintiffs contend, to be decided according to English law, as being the proper law of the contract, and if, when the contract is so interpreted, the exclusive licence granted by clause 6 of the contract must be held to have become void directly the relation of creditor and debtor ceased, as before this action it had ceased, to exist between the parties to that contract.

Now, assuming for the moment that the lex loci contractus, which was in this case England, and not the lex loci rei sitæ, that is the Roman-Dutch law of Southern Rhodesia, is the proper law of this contract, I find myself obliged, in due deference to the authority of judicial pronouncements which are binding upon us, to hold that the grant of the exclusive licence does fall under the peculiar ban of the equitable rule or doctrine in regard to clogging the equity of redemption, as that rule or doctrine has been applied in the recent decisions, which, as Swinfen Eady J. points out (1), had not been given

(1) [1910] 1 Ch. 354, 386.

when this contract of 1892 was made. I have come to this conclusion with reluctance. Here were two great companies, each, no doubt, availing itself of excellent legal advice. There is no suggestion of fraud, oppression, or misunderstanding. The plaintiff company in 1892 was in need of extensive financial aid. It sought that aid from the defendant company, and obtained it upon terms which included this grant of an exclusive licence to work its diamondiferous land. It is a grant of a licence the duration of which plainly was not intended to be limited to the duration of the debenture loan. Swinfen Eady J. has expressly so held. (1) Amongst the conditions, indeed, referred to in clause 6 was a provision that the licence may be renewed every five years in perpetuity by the payment of a 10*s.* fine. Under the fifth clause of the original agreement of April, 1892 (the agreement of December, 1892, is styled a "supplemental" agreement), the same exclusive grant, so far as regards the plaintiffs' territory south of the Zambesi, was, should the defendant company desire it, agreed to, although no debentures should be issued by the plaintiff company, or, if issued, should not be desired by the defendant company. It is a grant which, if made as an independent transaction and separately from the agreement of loan,—say, one day later,—would have possessed unimpeachable validity, for clause 6 contains in itself sufficient consideration for the grant in the shape of royalties and of the payment to the plaintiff company of 2 per cent. of the gross receipts of the defendant company on the sale of diamonds to be acquired by the defendant company by the use of the licence. It would, I am sure, be quite unjust to those who, upon the faith of this agreement, got from the defendant company the money which they needed, to think that they had the slightest notion that, because the grant of the exclusive licence formed part of an agreement whereunder the lender to the amount of his loan was to accept debentures which purported to charge, by way of floating security, all the borrowers' property and assets, they would be able, as it is now contended that they are able, to take away from the lender a most valuable part of the consideration for

(1) [1910] 1 Ch. 380.

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his assistance. I agree with Swinfen Eady J. when he observes (1) that "The truth probably is that, as the recent decisions on the doctrine of a clog had not been given when the agreements were entered into, that point was not present to the minds of either party." None the less, I feel myself bound by authority to accede to the plaintiffs' contention. I cannot, I think, otherwise follow, as I am bound to do, "the recent decisions on the doctrine of a clog" to which the learned judge in the Court below refers in the passage of his judgment which I have already mentioned, and which he cites chronologically in the portion of his judgment which follows this reference. I must content myself by quoting, in justification of my own regret, the words of Lord Halsbury L.C. and Lord Macnaghten in the judgments delivered by them in the latest of them, *Samuel* v. *Jarrah Timber and Wood Paving Corporation.* (2) "A perfectly fair bargain," said Lord Halsbury (3), "made between two parties to it, each of whom was quite sensible of what they were doing, is not to be performed because at the same time a mortgage arrangement was made between them. If a day had intervened between the two parts of the arrangement, the part of the bargain which the appellant claims to be performed would have been perfectly good and capable of being enforced; but a line of authorities going back for more than a century has decided that such an arrangement as that which was here arrived at is contrary to a principle of equity, the sense or reason of which I am not able to appreciate, and very reluctantly I am compelled to acquiesce in the judgments appealed from." "Speaking for myself," said Lord Macnaghten (4), "I should not be sorry if your Lordships could see your way to modify it" (the doctrine of the clog) "so as to prevent its being used as a means of evading a fair bargain come to between persons dealing at arms' length and negotiating on equal terms. The directors of a trading company in search of financial assistance are certainly in a very different position from that of an impecunious landowner in the toils of a crafty money-lender."

But the defendants' counsel contend that the decision against

(1) [1910] 1 Ch. 386.
(2) [1904] A. C. 323.
(3) [1904] A. C. 325.
(4) Ibid. 327.

the defendants of this question of the equitable clog which I have been considering does not conclude the case in the plaintiffs' favour. They argue very strenuously—indeed this subject formed the greater part of Mr. Upjohn's full and forcible argument—that the proper law of the contract, so far as it relates to the plaintiff company's land south of the Zambesi, is the Roman-Dutch law, in which the doctrine of the clog is not recognized, and therefore, so far as the territory subject to that law is concerned, the defendant company is entitled to succeed. Now, in ascertaining the proper law of a contract, that which we have to seek is the intention of the contracting parties: see the judgments of the Exchequer Chamber, delivered by Willes J., in *Lloyd* v. *Guibert* (1); of Bowen L.J., giving the judgment of the Court of Appeal, in *Jacobs* v. *Crédit Lyonnais* (2); Chitty J. in *In re Missouri Steamship Co.* (3); and Lord Halsbury in the same case, on appeal. To this intention, in the absence of express declaration on their part, we must be guided by applying to the language of the contract itself sound ideas of business convenience and sense, and by justly appraising the inferences to be drawn from the nature of the transaction, and the place and circumstances of its machinery and of its contemplated performance.

One of such considerations is generally, if not universally, conclusive. If it is apparent that the contract affects immovables situated out of the jurisdiction, the lex loci rei sitæ, in general at least, must be taken as the proper law of the contract. In the case of a contract with regard to an immovable, "its proper law is, in general but not necessarily, the law of the country where the immovable is situate": see Dicey, Conflict of Laws, 2nd ed. p. 510. But whilst I believe it to be true that an English Court will not assume jurisdiction to deal directly with either the property in or the possession of real estate which forms part of a foreign country or a colony, as I had occasion to point out in the recent case of *Bank of Africa* v. *Cohen* (4) in the judgment which was read by the appellants' counsel in the course of his argument, yet, as I there also pointed out, when an

(1) L. R. 1 Q. B. 115.
(2) 12 Q. B. D. 589.
(3) 42 Ch. D. 321, 336.
(4) [1909] 2 Ch. 129.

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English Court has before it parties to a contract affecting immovables out of the jurisdiction, it will, acting in personam and not in rem, "upon the conscience," as it has been put, "of the person living here," when it finds an equitable right enforceable by a judgment in personam, give effect to that equitable right, and so indirectly affect the interests of the litigants in immovable property abroad. Our Courts in so acting may possibly be found, I think, to be paying to the lex loci rei sitæ less regard than would be paid to it by the jurisprudence of some foreign countries. But this Court has to administer the law of England as established by authoritative decisions, and the law which I have just stated appears to me to be fully established by the judgments in *Lord Cranstown* v. *Johnston* (1) and *Ex parte Pollard*. (2) If this be so, I cannot avoid the conclusion that upon this last point also our judgment must be for the plaintiffs. The Court has before it an action in which conflicting claims, claim and counter-claim, are put forward in regard to a contract affecting land situate out of the jurisdiction: it finds in relation to that contract an equitable right existing in the plaintiff company to which it can give effect by a judgment in personam. It appears to me that it is bound to give effect to that equitable right; and if this be the correct view, we must dismiss this appeal, which is an appeal against the judgment of the Court below, which has made a declaration in affirmance of that right against the defendant company, and has dismissed the counter-claim for substantive relief in conformity with that declaration.

Solicitors: *Ingle, Holmes, Sons & Pott; Coward, Hawksley, Sons & Chance.*

(1) 3 Ves. 170. (2) Mont. & Ch 239.

W. C. D.

WILLMOTT *v.* LONDON ROAD CAR COMPANY, LIMITED.

C. A. 1910 Oct. 13.

[1909 W. 2371.]

Landlord and Tenant—Lease—Contract not to assign without Consent—Consent not to be withheld from "a respectable and responsible person"—Assignment to Limited Company—Forfeiture.

A lessee covenanted to use the demised premises for the business of a jobmaster and livery stable keeper, and not to assign or underlet or part with the possession of the premises without the written consent of the lessor, which was not to be withheld in respect of "a respectable and responsible person":—

Held, that the word "person" in the covenant included a corporation, such as a limited company, and that a limited company was capable of being "a respectable and responsible person" within the meaning of the covenant.

Decision of Neville J., [1910] 1 Ch. 754, reversed.

In re Jeffcock's Trusts, (1882) 51 L. J. (Ch.) 507, followed.

Harrison, Ainslie & Co. v. *Barrow-in-Furness Corporation*, (1891) 63 L. T. 834, unless distinguishable on other grounds, overruled.

Appeal from a decision of Neville J. (1)

By a lease dated May 31, 1900, the plaintiff granted certain land and buildings at Putney to one Porter for a term of sixty-two and a half years from September 29, 1899, at the yearly rent of 95*l.* 10*s.*, and Porter for himself, his executors, administrators, and assigns, covenanted (amongst other things) to use the premises for the business of a jobmaster and livery stable keeper and not without the previous written consent of the plaintiff or his heirs or assigns to assign or underlet or part with the possession of the premises or any part thereof, but such consent was not to be withheld "in respect of a respectable or responsible person"; and the lease contained the usual power of re-entry on breach of any of the covenants therein contained. In February, 1901, the lease was with the plaintiff's consent assigned to the defendants, who entered into and took possession of the premises under the lease.

In 1908 the defendants sold their undertaking and property to the London General Omnibus Company, Limited, and in December, 1908, the defendants applied to the plaintiff for leave

(1) [1910] 1 Ch. 754.

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to assign the lease to that company. On April 9, 1909, the plaintiff refused to give his consent to the assignment. In the following July the defendants without the plaintiff's consent let the London General Omnibus Company, Limited, into possession of the premises comprised in the lease. Thereupon the plaintiff commenced this action and claimed a declaration that he was entitled to re-enter and to recover possession of the demised premises as on a forfeiture of the said lease by reason of (inter alia) the defendants having without his written consent parted with the possession of the premises to the omnibus company, on the ground that that company was not "a person" within the meaning of the aforesaid covenant in the lease.

The defendants alleged in their defence that the London General Omnibus Company, Limited, was "a respectable and responsible person" within the meaning of those words in the lease, and counterclaimed for a declaration that they were entitled to assign the said premises to the omnibus company without further application to or receiving the consent of the plaintiff.

Neville J. held, following *Harrison, Ainslie & Co.* v. *Barrow-in-Furness Corporation* (1), that a corporation was not capable of being "a respectable and responsible person" within the meaning of the covenant, and that the plaintiff was entitled to recover possession.

The defendants appealed.

Butcher, K.C., and *Whitmore Richards*, for the appellants. 1. Prima facie in a statute and also in any other legal document the word "person" includes an artificial as well as a natural person: *Pharmaceutical Society* v. *London and Provincial Supply Association* (2); *In re Jeffcock's Trusts* (3); *Hirst* v. *West Riding Union Banking Co.* (4); *Hereford Corporation* v. *Morton* (5); *Newcastle Corporation* v. *Attorney-General* (6); 2 Coke's Institutes (1797 ed.), pp. 719, 721. 2. The context and the object of the document may be looked at to see whether "person"

(1) 63 L. T. 834.
(2) (1880) 5 Q. B. D. 310, 318; 5 App. Cas. 857, 861, 869.
(3) 51 L. J. (Ch.) 507.
(4) [1901] 2 K. B. 560.
(5) (1866) 15 L. T. 187.
(6) (1845) 12 Cl. & F. 402.

should have a more or a less extended meaning: *Pharmaceutical Society* v. *London and Provincial Supply Association*. (1) 3. Here the context and the object of the covenant point to the more extended meaning. The object of this covenant is the protection of the lessor in respect of the rent and other obligations under the lease, and there can be no reason why a limited company, admittedly solvent and respectable, such as this assignee, should not come within the words "respectable and responsible person" in this covenant. Neville J. has held that the term "respectable" is not applicable to a limited company and has considered himself bound by *Harrison, Ainslie & Co.* v. *Barrow-in-Furness Corporation* (2), but there the question was complicated by the question of ultra vires, and unless it is distinguishable on that ground it is wrong and ought to be overruled. Etymologically the term "respectable" means something which commands respect, and in that sense it aptly describes a company which carries on a legitimate business in a proper manner.

It has been held by the Court of Appeal that a limited company can maintain an action of libel for an injury to its reputation without proof of special damage: *South Hetton Coal Co.* v. *North Eastern News Association*. (3) It has also been held that a corporation is qualified to act as trustee—*In re Thompson's Settlement Trusts* (4)—and to take an apprentice: *Burnley Equitable Co-operative and Industrial Society* v. *Casson*. (5)

Peterson, K.C., and *W. H. Draper*, for the respondent. No doubt, since the Interpretation Act, 1889, the word "person" in an Act of Parliament prima facie includes a corporation. Apart from that Act the law is as stated by Lord Blackburn in *Pharmaceutical Society* v. *London and Provincial Supply Association*. (6) He says that in technical language the word "person" may include a corporation, and that the question in which way the word is used must depend upon the context and the subject-matter. He does not say that in a technical document such as a deed or a lease there is any presumption

(1) 5 Q. B. D. 310, 319.
(2) 63 L. T. 834.
(3) [1894] 1 Q. B. 133.
(4) [1905] 1 Ch. 229.
(5) [1891] 1 Q. B. 75.
(6) 5 App. Cas. 869.

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that "person" does include a corporation. In the Court below Thesiger L.J. states the law to be that in an Act of Parliament "person" will not include a corporation unless that construction is clearly required either by the context or by the scope and object of the Act. (1)

[COZENS-HARDY M.R. Lord Selborne states the proposition somewhat differently.]

The presumption, if any, in favour of the artificial meaning of the word in the case of a statute is a very slight one: per Lord Blackburn. In that case the Court was dealing not with a conveyancing document but with a statute, which stands on a different footing. With the single exception of *In re Jeffcock's Trusts* (2) it has never been held that in a legal document other than a statute "person" includes a corporation, and that was not the case of a lease, but of a power in a will, and there was there no opposition. The result of so holding as a general proposition would be that if a contract were contained in a series of letters the word "person" would have its ordinary and natural meaning, whereas if it were embodied in a formal agreement the word would include a corporation although the contract related to the same subject-matter.

[FARWELL L.J. referred to Blackstone's Commentaries, i. 123.]

Further, the word "respectable" as used in this covenant is not really applicable to a corporation at all. A corporation is an abstraction, and it cannot be predicated of it that it is either respectable or not respectable. The capacity to pay rent is covered not by "respectable" but by "responsible," and "respectable" cannot be construed as equivalent to "responsible." "Respectable" relates to behaviour, "responsible" to financial stability.

[FARWELL L.J. You constantly speak of a respectable insurance company, meaning a company which conducts its business in a proper and respectable manner.]

When the term is applied to a company it really has reference not to the company itself, which is an abstract entity, but to the persons who have the management of the company.

Butcher, K.C., in reply.

(1) 5 Q. B. D. 319. (2) 51 L. J. (Ch.) 507.

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COZENS-HARDY M.R. This is an appeal from a judgment of Neville J. by which he has declared that the London General Omnibus Company, being a corporation, is not a respectable and responsible person within the meaning of a covenant contained in a lease which I will read in a moment, and has declared that the lessor is entitled to recover possession of the demised premises. The appeal raises a question undoubtedly of importance and undoubtedly too, in my judgment, of difficulty. Two learned judges, Romer J. and Neville J., have taken a view which, with the utmost respect, I am unable to accept. The lease was a lease granted in 1900 to a Mr. Porter of some premises at Putney. The rent was 95*l.* a year. The property was insured for 5000*l.*; it was a valuable property apparently, and the lease contained this covenant. [His Lordship read the covenant.] Mr. Porter did assign to the present defendants, the London Road Car Company, in 1901, and the plaintiff gave his consent to the assignment. The defendants were minded to assign to the London General Omnibus Company. It is quite immaterial, but we are told that the assignment was part of a scheme of reconstruction.

The real question, and the only question which has been decided by Neville J., is that in his view a corporation is not a "person" and cannot be a "responsible and respectable person" within the meaning of this covenant. I think it is necessary to consider with some care what is the true prima facie meaning of the word "person"—what is its meaning at common law and apart from any statutory enactment. I go back to Lord Coke and his exposition of the statute of 39 Eliz. c. 5. The language of the statute there was quite positive. It was a statute that all and every person and persons seised of an estate in fee simple might—I am stating the substance of the Act very shortly—found hospitals or almshouses, and Lord Coke upon those words "all and every person and persons" says this (2nd Inst. (1797 ed.) p. 722): "These words regularly doe extend to any body politick or corporate, but not to such as are restrained by any Act of Parliament to alien &c., but doth extend to such bodies politick and corporate as may alien." He does not put that on any context in the Act—on the contrary there is no

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context—but he puts it as a general proposition. "These words regularly doe extend to any body politick or corporate such as may alien." Of course a corporation which had no power of alienation could not be a person within the meaning of this Act, which says that any person may alien. It did not authorize an act which was otherwise ultra vires. Then we come to Blackstone's authority. The passage which was read by Farwell L.J. from the Commentaries (i. 123) is quite explicit. "Persons are divided by the law into either natural persons, or artificial." Then, again, we come to the very important case of *Pharmaceutical Society* v. *London and Provincial Supply Association* (1) in the House of Lords. Lord Selborne, in language which I think is perfectly unambiguous, said that prima facie in a statute the word "person" would include an artificial person or a corporation. Lord Blackburn indicated the same view, although he said he was not so clear about it. It is said, True, that may be so as to statutes, but that is a construction which is limited to statutes; it has no application to instruments even of the most formal character under seal such as this lease is. Is there any authority for that? So far as I am aware there is not. Is there any authority to the contrary of that? I think there is, for Chitty J.'s decision in *In re Jeffcock's Trusts* (2), which was a case of a will, shews that where trustees of a will have power given to them to grant leases to any person or persons as they may think fit, a limited company, that is to say, a corporation, is, within the meaning of that power, a person to whom the trustees may lawfully and properly grant a lease. I am not aware that the precise point has arisen with reference to a lease, but certainly I should be most unwilling to draw a distinction which I think would be contrary to the whole trend of modern dealings, and to say that a corporation in a lease of this kind was not to be regarded as a person. The real stress of Mr. Peterson's and Mr. Draper's able arguments rested on the words "responsible and respectable." Let me take them one by one. It is plain, of course, that under this lease and apart from this covenant a company could be an assign of the lease. There is no dispute about that. It was not ultra vires of the

(1) 5 App. Cas. 857. (2) 51 L. J. (Ch.) 507.

company to accept a lease and it was perfectly competent to become an assign. Suppose the words had simply been that consent should not be withheld in the case of a responsible person, I cannot bring myself to doubt that in that case a company which was admitted to be responsible in the sense of being able to discharge all obligations in respect of rent and covenants under the lease would be a responsible person within the meaning of that covenant, and therefore a person with respect to whom consent could not be refused. But then it is said, and this is the point which alone has given me difficulty in this case, "Can it be said that a corporation can be respectable? Does not the addition of that word 'respectable' compel you to say that in this case the word 'person' must be limited to an individual, a human personality, a person who is capable of acts moral or immoral?" In my opinion that is not so. I think the ordinary use of language justifies you in saying that a company is a respectable company. We all use that language habitually. We talk of a respectable insurance company, or a respectable bank, and in that case we refer to the mode in which the company or the bank conducts its business. But I think we are not without assistance from authority which is absolutely binding on us. A limited company or a company whether limited or not can maintain an action of libel for an injury to its reputation without proving any special damage. *South Hetton Coal Co.* v. *North Eastern News Association* (1), which is a decision of this Court in 1893, is a clear authority on that point. The material passages of the judgments have been read and I do not propose to read them again. I am content to rely on a passage there quoted from the judgment of Pollock C.B. in *Metropolitan Saloon Omnibus Co.* v. *Hawkins* (2), where he says that in order to carry on business it is necessary that the reputation of a corporation should be protected, and therefore in cases of libel and slander it must have a remedy by action. A company can have a reputation which is not the reputation of the individual directors, but the reputation of the company, the reputation which the company itself and itself alone can protect by means of an action of libel. Are we to draw

(1) [1894] 1 Q. B. 133. (2) (1859) 4 H. & N. 87, 90.

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a distinction and say "True, that might be applicable if the word in the covenant had been 'reputable,' but it is not 'reputable' but 'respectable'"? I decline to draw that fine distinction. It seems to me that the better view (which I think is in accordance with modern policy and the trend of all mercantile proceedings) is to say that a company in a clause of this kind is a person who may be both respectable and responsible, and that therefore there can be no right to refuse to assign to it. In other words, I think, taking the whole context of this clause, that it really amounts to this: "You shall not assign or underlet without my previous consent, but such consent shall not be withheld in the event of the contemplated assignee or underlessee, who might be an incorporated company, being a respectable and responsible person," the word "person" being there used as a term which is equally applicable to an artificial and to a natural person.

I am aware that the view I am taking in this case is contrary to that expressed by Romer J. in *Harrison, Ainslie & Co.* v. *Barrow-in-Furness Corporation.* (1) That decision may have been right on other grounds, as to which I say nothing, but the learned judge, from whom I never differ but with great hesitation, says this: "No doubt, for many purposes, the word 'person' includes corporation, as, for example, for the purposes of the Conveyancing Act, 1881. The question I have to decide is, whether, looking at this particular lease, I can hold that a corporation such as that of Barrow-in-Furness falls within the definition of 'a person of responsibility and respectability.' I think not. Although the word 'person' may, under many circumstances and for many purposes, include a corporation, I do not think that is prima facie the natural meaning of the word; but whether that be so or not, I have here to deal with a clause about a person of responsibility and respectability. Looking at the phrase as a whole, and considering the terms of the lease, I do not hold that the corporation can be said to come within the fair meaning of these words." With that decision before him I think that Neville J. was perfectly right in giving the decision which he did, following the decision of a judge of co-ordinate jurisdiction and leaving the parties to come to the

(1) 63 L. T. 834, 836.

Court of Appeal; but having arrived at a clear opinion in my own mind that both those decisions are wrong, I think that the only course open to us is to say that this appeal must be allowed and the action dismissed with costs here and below.

FLETCHER MOULTON L.J. I am of the same opinion. The question before us turns upon the construction of a provision in a lease, and of course in construing it we must take into consideration all the words that we find there. But, as the argument of the counsel before us has indicated, the question naturally falls into two parts. We have first to consider whether the word "person" used in a provision of this type in a lease can include corporations or whether it is restricted to individuals. Then if we come to the conclusion that it can include corporations we have to consider whether the indications afforded by the two epithets which are applied to the word "person" in the lease in question are such as to lead us to the conclusion that it bears a narrower sense here.

In my opinion there can be no question that the word "person" may include a corporation. The quotation from Blackstone's Commentaries is decisive on the point, and I have never known any doubt thrown upon it. But, as Lord Blackburn points out in *Pharmaceutical Society* v. *London and Provincial Supply Association* (1), the fact that the word has an extended meaning in law does not bring with it as a matter of necessity that wherever that word is used we must attribute to it that extended meaning. He there points out that in ordinary parlance "person" would probably be used—certainly in many contexts—in a much narrower signification. He further points out that in legal documents the probability would be that it was used in its more complete legal sense. In so saying the learned Lord does not in my opinion intend to draw any hard and fast line between two classes of documents and to lay down the principle that we must attribute a particular meaning to the word when used in one class of documents and must not attribute that meaning to it when used in the other. He intends, I think, to indicate that as we proceed from common parlance towards the most

(1) 5 App. Cas. 857.

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technical legal documents there will be a gradually increasing probability that the full legal sense is to be attached to the word. Now in the present case we are dealing with a lease, a document of a legal character, drawn up no doubt by persons in the legal profession, and I ask myself whether in this document the word "person" is to bear its full extended legal meaning or whether we are to attribute to it the narrower meaning which it bears so frequently in ordinary conversation. On this point we have a very valuable guide in the decision of Chitty J. in *In re Jeffcock's Trusts.* (1) In that case some trustees under a will had power to let trust property to such person or persons as they might think fit, and they came to the Court to know whether that authorized them to let the property to a limited company. This raised in the clearest way the question whether in a document of that type the proper interpretation (apart from indications to the contrary) of the word "person" was its extended sense or not, and Chitty J. decided that it must be deemed to be used in the extended sense. I cannot help thinking that it would have been a disastrous thing if it had been decided otherwise. I see no reason why trustees in such a case should be prevented from accepting eligible tenants merely because they are corporate bodies when they may be as capable of performing the covenants and paying the rent as any individual tenant the trustees might get. I may say also that I think that a gradual change in the organization of the business world has been going on for the last century, whereby more and more of the business of the country is transacted by corporations, and less and less by private individuals, and this would naturally bring and in fact has brought with it an increased tendency to use the word "person" as including all legal persons who can perform the duties of persons with regard to property. The possibility that a tenant would be a corporate body was very much smaller one hundred years ago than it is at the present time. Hence in any legal document dealing with the holding of property and the performance of the obligations connected with it I should myself be inclined to hold that "person" was used in its extended sense unless there was something in the context or in the object of the

(1) 51 L. J. (Ch.) 507.

provision which drove me to a different conclusion. In the present case there is nothing of the kind. A power to object on reasonable grounds to a person as an assignee of a lease is in my opinion only a provision for the protection of the lessor with regard to the proper user of the property and the performance of the covenants as to rent or otherwise, and I can see no reason why that should exclude any important branch of the wide class to which the word "person" is properly applied provided that members of that branch are capable of performing the obligations under the lease.

For these reasons I am of opinion that the first part of the argument of the plaintiff's counsel breaks down, and that if there were no adjective qualifying the word the provision in the lease that the consent should not be withheld in respect of a person against whom there was no objection would certainly include corporations.

Now do the two epithets which qualify the word "person" indicate that the narrower sense is to be given to the word; in other words, are they so personal, so individual, that they preclude our including those artificial persons recognized by the law whom we call corporations? The word "responsible" is just as applicable to a company or any other incorporated body as it is to a person, and that has not been contested at the Bar. The whole argument on this part of the case has been based on the word "respectable." In my opinion the word "respectable" points to the behaviour of the person, primarily in carrying on his business, but probably also in the whole of his external relations, and I cannot see why it is not just as applicable in that sense to a corporation as it is to a natural person. It is perpetually used with regard to corporations. The instance that was given by Farwell L.J. in the course of the argument is probably as good as any. You might well say "No respectable insurance company adopts such and such a policy." Everybody would understand that to mean an insurance company which carried on its business in accordance with high principles and which had acquired a corresponding reputation. The object of this provision was that the property should only go into hands that would treat it so that the locality, if I might say so, would

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not lose reputation, and in which the performance of the covenants of the lease would be secure. I cannot see why the words "respectable" and "responsible" should not have been inserted in order to exclude corporations that did not carry on business in a reputable manner or were not equal to the burdens of the covenants and therefore not responsible, and not with any intention to exclude corporations generally. For these reasons I come to the conclusion that the London General Omnibus Company was a proper tenant as to whom consent to assign could not be refused, and I agree with the conclusion of the Master of the Rolls that the action must be dismissed and the appeal allowed.

FARWELL L.J. I am of the same opinion. We are considering the true construction of a clause in a lease of 1900. One has to remember that in the year 1900 the development of the one man company principle had gone very far and that limited companies were very numerous. The lease contains this clause that the lessee is not to assign except to "a respectable and responsible person." Prima facie in my opinion in a legal document in the year 1900, as in the case of a will creating a power to grant leases of land, the word "person" bears the meaning attributed to it by Blackstone. He says "Persons are divided by the law into either natural persons or artificial"; that is to say, the word "person" prima facie includes both natural and artificial persons unless there is something to the contrary in the context. I do not think "person" is a technical word within the meaning of the rule that technical words are to have their technical meaning, but the phrase "the ordinary meaning of words" must necessarily be understood in reference to the subject-matter to which those words are applied. Thus it is certainly true, as Lord Blackburn pointed out (5 App. Cas. 869), that when you are discussing who is the richest man in London you have not present to your mind a corporation, and that in such a case "person" does not naturally include a corporation. So, if I say "I saw a crowd of persons in Trafalgar Square" I necessarily mean natural persons and not corporate individualities; but when the Court has to construe a lease made in 1900

different considerations apply, and bearing in mind that a large proportion of the owners of property, as lessees or grantees, in 1900 were incorporated bodies, the inference is irresistible in such a document that "person" includes "corporation." I think it is involved in Chitty J.'s decision; he had necessarily no evidence, as the matter came before him on a petition for advice by trustees and there was no context in the will, and he had to decide the simple question whether a power to grant leases to any person or persons the trustees should think fit would authorize them to grant a lease to a limited company, and he held that it would. He must have held that prima facie that was the meaning of those words in a will containing such a power. That being so, the only question which remains is whether the prima facie meaning is got rid of by the use of the two epithets "responsible" and "respectable." I cannot see that they have any limiting effect at all. The responsibility relates to financial capacity, and it has hardly been argued, and I think it is not arguable, that that is not as applicable to a corporation or limited company as to an individual. The lessor desires to have a responsible tenant whether the tenant be an individual or a corporation. He also desires to have a respectable tenant. "Respectable" there means something which is worthy of respect. Why it should be said that the words "respectable" or "not respectable" are inapplicable to a limited company I fail to see. I think it clear that a company has a reputation in the eye of the law, and, if its reputation for respectability is impugned by a written statement that it is not a respectable company, an action for damages would lie at its instance without giving any particulars shewing special damage. It appears to me, therefore, that if it were not for Romer J.'s decision the case would have been plain, and I think that probably Neville J. would have decided the other way. With the greatest possible respect I confess I am unable to follow the reasoning of Romer J. I am not prepared to say that the decision might not be supported on the ground stated by Lord Coke, because although it may very well be that "person" includes a corporation which is capable of accepting a lease, it would be a wrong construction to say that it includes a corporation which had no power either to

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accept the lease or to perform the obligations incident thereto without spending money which it had no legal right to spend. It might have been put on that ground, or it might have been put on the ground, possibly, that a corporation ready and willing so to act was not respectable. However that may be, we are not bound by the decision. If it is not distinguishable upon those grounds I cannot agree with it. I think myself that it is distinguishable; at any rate I think the decision of Neville J. cannot stand, and that this appeal should be allowed and the action dismissed with costs here and below.

After some discussion a declaration was made in the terms of the defendants' counter-claim.

Solicitors: *Joynson-Hicks, Hunt, Moore & Cardew; Nicol, Son & Jones.*

H. B. H.

JOYCE J. 1910 *April* 14; *July* 20, 21.

In re TREVANION.

TREVANION *v.* LENNOX.

[1909 T. 1820.]

Will—Construction—Devise of Real Estate in strict Settlement—Trust for Accumulation—Person who shall be "entitled to the possession and enjoyment"—"Under the trusts and limitations of this my will"—Tenant in Tail in Possession—Disentailing Deed—Right to Accumulations.

Testator devised his real estate to trustees to the use of his wife for life and after her decease to the use of the first and every other son of his son H. successively in tail male with divers remainders over, and he directed that during a certain period the trustees should accumulate the rents and profits of his real estate and hold the same and the accumulations thereof upon trust for the person or persons who at the expiration of the said period should "under the trusts and limitations of this my will be entitled to the possession and enjoyment" of his real estate.

Upon the death of the testator's widow the first tenant in tail executed a disentailing assurance, and, although the period of accumulation had not expired, claimed to be entitled to the receipt of the rents and profits of the estate and to the accumulations:—

Held, that before the disentailing deed the plaintiff was in possession and enjoyment of his estate tail under the limitations of the will subject to the trust for accumulation, and notwithstanding the disentailing deed he was still in possession under the limitations of the

will although he had become owner in fee; that upon the cesser of the period of accumulation he, his heirs or assigns, would be entitled under the limitations of the will, and no one else could be so entitled; and that consequently the trust for accumulation could no longer be enforced, and he was entitled to be let into possession.

ADJOURNED SUMMONS.

H. C. Trevanion by his will, dated August 30, 1895, appointed the Honourable Charles Lennox and F. B. Money Coutts executors and trustees thereof and, after giving certain legacies and annuities, devised all his manors, messuages, lands, tenements, and hereditaments being freehold of inheritance to the uses therein following (that was to say) To the use that his trustees should receive during the life of his son Hugh Arundell Trevanion or until the annuity thereinafter mentioned should determine as thereinafter mentioned an annuity of 500*l.* to be charged upon the said premises thereinbefore devised, and the testator directed that his trustees should stand possessed of the said annuity upon the trusts therein mentioned for the benefit of the testator's son Hugh Arundell Trevanion, and the testator declared that subject and charged as thereinbefore mentioned the said hereditaments and premises thereinbefore devised should remain and be to the use of his widow, Lady Frances Trevanion, for life, and after her decease to the use of the first and every other son of the said Hugh Arundell Trevanion successively according to their respective seniorities in tail male, with divers remainders over. The testator further declared that if any son or daughter of the said Hugh Arundell Trevanion should or would if living attain the age of twenty-five years before the expiration of twenty-one years from the death of the survivor of the testator and his wife, then the vesting of the estate and interest of any such son or daughter should be postponed until the attainment by him or her of the age of twenty-five years. The testator also devised all his copyhold and customary messuages, lands, tenements, and hereditaments and bequeathed all his leasehold hereditaments to his trustees upon trusts corresponding as nearly as might be with the trusts thereinbefore limited and declared of his freehold hereditaments, and he bequeathed his residuary personal estate upon trusts for conversion and investment as therein mentioned for the benefit (as far

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as was possible) of the persons who should be and become entitled to his freeholds of inheritance. The will also contained the following proviso:—"Provided always and I hereby direct and declare that if the said Florence Eva Trevanion formerly the wife of the said Hugh Arundell Trevanion shall survive me and my said wife then and in that case none of the children of my said son Hugh Arundell Trevanion by the said Florence Eva Trevanion shall during the life of their said mother the said Florence Eva Trevanion or during the term of twenty-one years from my decease in case the life of the said Florence Eva Trevanion shall continue beyond twenty-one years after my death be entitled to receive any of the rents or income of the real or personal estate hereby devised and bequeathed or of any investment for the time being representing any of such real or personal estate but all such rents and income as but for this present direction would have been payable to or applicable for the maintenance or otherwise for the benefit of any child or children of my said son Hugh Arundell Trevanion shall during the life of the said Florence Eva Trevanion or during the term of twenty-one years from my decease in case she shall outlive such term of twenty-one years be received by my trustees or trustee and be invested by them in their joint names in any funds or securities hereby authorised as investments and the dividends and income to arise from such funds or securities shall be in like manner invested by my trustees and accumulate during the life of the said Florence Eva Trevanion or during such shorter term of twenty-one years as aforesaid and my trustees shall hold such rents and income and the investments and accumulations thereof upon trust for the person or persons who at the death of the said Florence Eva Trevanion or at the expiration of the said term of twenty-one years from my death (whichever event shall first happen) shall under the trusts and limitations of this my will be entitled to the possession and enjoyment of the real and personal estate hereby devised and bequeathed."

The testator died on May 20, 1901, and his widow, Lady Frances Trevanion, died in 1903.

The testator's son Hugh Arundell Trevanion and his wife, Florence Eva Trevanion, had three sons, namely, the plaintiff, Hugh Eric Trevanion, born in 1884, the defendant Charles Cecil

Trevanion, born in 1886, and the defendant Arundell Claude Trevanion, born in 1887, all of whom were now living, as were also their parents, Hugh Arundell and Florence Eva Trevanion.

By a disentailing assurance dated January 30, 1906, the plaintiff, H. E. Trevanion, conveyed all the hereditaments of freehold, copyhold, or customary tenure to which he was entitled for any estate in tail under the limitations of the will of the testator to a trustee in fee simple absolutely discharged from all estates tail in him, the plaintiff, and all estates, rights, and powers to take effect after the determination or in defeasance of such estates in tail to the use of or in trust for himself, the plaintiff, absolutely.

On December 6, 1909, having then attained the age of twenty-five years, he executed a second disentailing assurance by way of confirmation of the first and expressed to be supplemental thereto.

This was an originating summons taken out by the plaintiff for the determination, inter alia, of the question whether the plaintiff was now absolutely entitled to the accumulations of income of the testator's real and residuary personal estate made since the death of the testator's widow and to the rents, profits, and income thereof respectively freed from all liability of such rents, profits, and income to accumulation during the life of the plaintiff's mother, Florence Eva Trevanion, or during a period of twenty-one years from the death of the testator pursuant to the direction in that behalf contained in the said will or during any other period.

The defendants to the summons were the trustees of the will and the plaintiff's youngest brother, Arundell Claude Trevanion. His second brother, Charles Cecil Trevanion, was not originally made a defendant, he being at the time of the taking out of the summons resident in Ceylon.

The summons first came on upon April 14, 1910.

Hughes, K.C., and *J. Bradley Dyne*, for the plaintiff. The question which arises in this case is whether the plaintiff as tenant in tail is now entitled to receive the income of the settled estates and the accumulations of income notwithstanding the direction to accumulate for a period which has not yet expired.

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We submit that he is. No one else can now be so entitled. He became the first tenant in tail, and having barred his estate tail no one else can ever be "entitled to the possession and enjoyment of the estates under trusts and limitations of the will."

Bryan Farrer, for the defendant Lennox. There is here a gift of the accumulations to a persona designata, i.e., to a person who has to be ascertained at the expiration of a particular period. The gift is to the person who shall at that time, under the trusts and limitations of the will as they stand, be entitled to possession and enjoyment of the estates.

[JOYCE J. referred to *In re Petre's Settlement Trusts.* (1)]

In that case your Lordship was referred to *Hogg* v. *Jones* (2), which is very much like the present case in its actual terms.

[JOYCE J. That was a case of "actual possession," which makes all the difference.]

Hogg v. *Jones* (2) shews that where there is a gift to a person entitled in possession at a particular period, under the limitations of a will, the execution of a disentailing deed which prevents any person except the tenant in tail ever becoming entitled under the limitations of the real estate does not affect the gift of the personal estate under the will, but it goes to the person who, under the limitations of the will, would have been entitled if there had been no disentailing deed.

The disentailing deed is no part of the limitations and trusts of the will, but something dehors the will altogether. The person to take these accumulations under the will is a person to be ascertained at a future period; therefore, at this moment, the plaintiff cannot say that he is entitled absolutely to the whole property so as to bring himself within *Harbin* v. *Masterman.* (3)

K. J. Muir Mackenzie, for the other trustee, Mr. Money Coutts.

L. W. Byrne, for the defendant Arundell Claude Trevanion. The accumulations are given to the persons or person who at a certain period shall fulfil two conditions: (1.) they must be entitled

(1) [1910] 1 Ch. 290. (2) (1863) 32 Beav. 45.
(3) (1871) L. R. 12 Eq. 559.

under the trusts and limitations of the will; (2.) they must be entitled to the possession and enjoyment of the real estate devised by the will. I admit that a tenant in tail who has executed a disentailing assurance is in possession under the limitations of the will, but I do not admit that a person claiming under him is so in possession. It is impossible to say who will be entitled until the expiration of the period: *Lord Lilford* v. *Attorney-General* (1); *Adams* v. *Beck* (2); *Law Union and Crown Insurance Co.* v. *Hill* (3); *In re Petre's Settlement Trusts.* (4)

[JOYCE J. Are not the limitations of the will put an end to by the barring of the entail? If so, nobody can ever become entitled under them.]

If "the limitations" mean the limitations of the will plus the disentailing deed, then it is necessary to wait and see if there is anybody who will fulfil the conditions.

Hughes, K.C., in reply. Nobody except the applicant can ever be entitled under the trusts and limitations of this will. There cannot be any possible trusts or limitations of the will subsequent to the estate of the plaintiff, which has now become enlarged into an estate in fee simple. The plaintiff has an estate in fee, and by the operation of the Act for the Abolition of Fines and Recoveries, 1833, s. 15, every subsequent interest under the estate tail which was in him is extinguished, and every estate "to take effect after the determination or in defeasance of any such estate tail." Consequently he and his heirs and assigns are the only persons who can possibly take any interest.

JOYCE J. I am unable to understand or see how, in any view of this case, any person can be entitled to these rents and accumulations except the applicant, his heirs and assigns, and in my opinion he is entitled to them.

[His Lordship then directed that formal notice of this judgment should be given to Charles Cecil Trevanion, and that if he desired to appear the summons should be amended by adding him as a defendant.]

(1) (1867) L. R. 2 H. L. 63.
(2) (1858) 25 Beav. 648.
(3) [1902] A. C. 263.
(4) [1910] 1 Ch. 290.

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On the application of Charles Cecil Trevanion the summons, which had been amended accordingly, was subsequently restored to the list for rehearing.

July 20. *Hughes, K.C.*, and *J. Bradley Dyne*, for the plaintiff.

Bryan Farrer, for the defendant Lennox.

K. J. Muir Mackenzie, for the defendant Money Coutts.

L. W. Byrne, for the defendant Arundell Claude Trevanion.

Upjohn, K.C., and *Sargant*, for the defendant Charles Cecil Trevanion. The disentailing deed only gave the plaintiff a base fee, and not the fee simple, because the estate limited to the trustees upon trust to accumulate was an existing estate prior to the estate tail. The trustees therefore constituted the protector of the settlement within s. 22 of the Act, and their consent to the disentailing deed was necessary and was not obtained. They were not bare trustees within the meaning of the exception in s. 27 because they had active duties to perform: *In re Cunningham and Frayling*. (1) If, however, the trustees did not constitute the protector of the settlement, then we submit that the last paragraph of s. 33 of the Act applies, and the Court of Chancery was the protector, and its sanction was necessary in order effectually to bar the entail. But even if there was no protector and no consent was necessary, then the plaintiff does not shew that he is absolutely entitled to the accumulations. The words "under the trusts and limitations of this my will" mean "under the trusts and limitations to be found in this my will without regard to any other disposition whatsoever," that is to say directly. Any other view might lead to an absurd result, because any one who at the dropping of the term was entitled to the possession and enjoyment of the estate—e.g., a mere lessee—would be entitled to the accumulations. The words are merely intended to describe the person who is to take.

This is not a case where personal estate is limited by reference to the limitations of real estate; nor is it a case of heirlooms. In such cases the intention is to give an estate analogous to that in the real estate. Here, at the expiration of a certain period, the trustees are directed to hand over these accumulations to a

(1) [1891] 2 Ch. 567.

definite person pointed out by the will. The plaintiff is seeking to turn predication into prediction. He cannot now predicate that he is the person who will ultimately fill the position pointed out by the testator. In order to ascertain that person it is necessary to proceed either upon construction pure and simple, or upon construction of the will plus all subsequent events. The mere fact that the plaintiff is in a position to prescribe who shall be entitled to take is not enough. The only person to take is the person of whom it may be said that he is entitled under the trusts and limitations of the will to the possession and enjoyment of the real and personal estate thereby devised and bequeathed: *Hogg* v. *Jones* (1); *In re Cornwallis* (2); *Wesselenyi* v. *Jamieson* (3); *In re Petre's Settlement Trusts.* (4)

[JOYCE J. referred to *Harrington* v. *Harrington.* (5)]

JOYCE J. Under the limitations of this will upon the death of the widow of the testator, Lady Frances, the plaintiff became the legal tenant in tail in possession. Now whatever the interest, or by whatever name you call it, that is given to the trustees under the will, it is not in any sense, in my opinion, an estate prior to this estate tail which fell into possession upon the death of Lady Frances. The gift to the trustees is only annexed by way of a proviso, which, in my opinion, cuts down, or attempts to cut down, the gift of the estate tail, and is not, in any sense, an essential part of the gift of the estate tail to the present applicant, the result being that the applicant became, and was, prior to the execution of the disentailing deed, tenant in tail subject to this proviso, whatever the effect of the proviso may be. That being so, if I am right in thinking that there is no estate in the trustees prior to the estate tail, and that this clause is only a cutting down clause, or something which subtracts, or attempts to subtract, from the enjoyment of the estate tail, it follows that the tenant in tail, the present applicant, had power to bar the entail under the Act for the Abolition of Fines and Recoveries. Now with reference to a part of Mr. Hughes'

(1) 32 Beav. 45.
(2) (1886) 32 Ch. D. 388.
(3) [1907] A. C. 440.
(4) [1910] 1 Ch. 290.
(5) (1868) L. R. 3 Ch. 564.

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argument, I am not sure that this clause is a defeasance clause—that it operates in defeasance of the estate tail. Perhaps it does. It rather strikes me as more analogous to a charge, or something in the nature of a charge, upon the estate tail, possibly—though I am not sure and do not think it is necessary to decide it—bad as a fetter upon the absolute interest. I do not think that it would be so, at all events, until the estate tail was barred. But I am of opinion that the applicant had power to bar the estate tail; and if we admit for the sake of argument that, whatever the interest of the trustees may be which was created by virtue of this proviso, it is in the nature of a charge and is good, then the question arises, for whose benefit does this charge or whatever it be exist? Before the disentailing deed the applicant was in possession and enjoyment of the estate tail, subject to this clause, under the limitations of the will. In my opinion, notwithstanding the disentailing deed, he is still in possession and enjoyment under the limitations of the will although he has become owner in fee. As Mr. Hughes put it, quoting from *Lord Lilford* v. *Attorney-General* (1), "The disentailing deed did not operate to destroy the interest of which he was the successor, but enabled him, by the exercise of the power which that interest gave him, to render it perpetual." That being so, the present applicant, his heirs or assigns, will be entitled to this estate under the limitations of the will when the event happens upon which the accumulations are to cease; and not only so, but, in my opinion, no one else possibly can become entitled to the possession and enjoyment of these estates under the limitations or otherwise except the present applicant, his heirs or assigns. If I am right in this, of course no trust for accumulation or limitation or direction as to accumulation during the interest or any part of the interest of this owner in fee can be enforced. Where there is an absolute vested interest, it is well settled that the Court will not enforce a trust for accumulation in which no person has any interest except the owner of the property the rents of which are to be accumulated: *Gosling* v. *Gosling*. (2) That being so, if I am right it decides this case. It appears to me that this plaintiff is entitled to the possession and enjoyment of the

(1) L. R. 2 H. L. 70.

(2) (1859) John. 265.

estates under the limitations of the will, and that no other person can possibly be in possession and enjoyment of these estates under the limitations except the plaintiff and perhaps his heirs or assigns; and, therefore, this trust for accumulation cannot possibly be enforced as against him. Therefore he is, in my opinion, entitled to be let into possession and to receive the rents and profits himself.

Solicitors: *Mackrell, Maton, Godlee & Quincey; Farrer & Co.; Walker, Martineau & Co.; Budd, Brodie & Hart.*

G. A. S.

In re AMALGAMATED SOCIETY OF RAILWAY SERVANTS (PARLIAMENTARY FUND TRUSTS). ADDISON *v.* PILCHER.

[1910 A. 803.]

Practice—Originating Summons—Trust Instrument—Declared Trust void for Illegality—Resulting Trust—Application to enforce—No Question of Construction—Rules of the Supreme Court, Order LIV.A, *rr.* 1, 4; *Order* LV., *r.* 3.

Where the trust declared by an instrument is void for illegality, the settlor claiming by way of resulting trust is not a "cestui que trust under the trust of" that instrument and cannot therefore enforce the resulting trust by an originating summons under Order LV., r. 3:—

Semble. If no question of construction arises under the instrument, the Court, even if it has jurisdiction, will not give partial relief by making "a declaration of the rights of the persons interested" under the discretionary Order LIV.A, rr. 1, 4, but will leave the whole matter to be dealt with in an action to enforce the resulting trust.

ORIGINATING SUMMONS.

Under the rules of the above society the plaintiff and other members had contributed certain sums to a parliamentary fund the trusts whereof as declared by the rules were to maintain parliamentary representation and provide for representation of railwaymen in the House of Commons.

The trusts of the parliamentary fund having been declared illegal in *Osborne* v. *Amalgamated Society of Railway Servants* (1),

(1) [1909] 1 Ch. 163; [1910] A. C. 87.

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the plaintiff "on behalf of himself and all other members of the said society by whom contributions have been paid for parliamentary representation and placed in the said fund" issued an originating summons against the defendants "the trustees of the above named society in whose names the above mentioned fund is invested" to establish and enforce a resulting trust.

The summons was intituled "In the matter of the trusts declared by the rules of the Amalgamated Society of Railway Servants of England Ireland Scotland and Wales concerning a fund established for the maintenance of parliamentary representation."

The plaintiff asked for—

(*a*) "A declaration that upon the true construction of the said rules and in the events which have happened the said fund ought to be distributed among the persons who have contributed thereto or their legal personal representatives in proportion to the amounts actually contributed by such persons to the said fund."

(*b*) "An account of the investments now representing the said fund."

(*c*) "An inquiry who in the events which have happened are entitled to the said fund and in what proportions."

(*d*) "Distribution of the said fund among the persons entitled thereto."

(*e*) "An order that the defendants transfer the said fund and the investments representing the same into Court pending such distribution."

(*f*) "If and so far as necessary execution by the Court of the trusts upon which the said fund is held in the events which have happened."

The defendants took the preliminary objection that the plaintiff could not enforce a resulting trust by means of an originating summons either under Order LV., r. 3, or Order LIV.A, r. 1. This objection having been sustained by the Master, the summons was adjourned into Court.

L. W. Byrne, for the plaintiff. Order LV., r. 3, provides that "the trustees under any deed or instrument . . . . and any person claiming to be interested in the relief sought . . . . as cestui que

trust under the trust of any deed or instrument" may take out an originating summons (inter alia) for the determination of any question affecting the rights or interests of the person claiming to be cestui que trust, the furnishing of accounts, payment into Court, or the determination of any question arising in the administration of the trust. The rules of the society constitute an instrument for this purpose: *In re Printers and Transferrers Amalgamated Trades Protection Society.* (1) The order is set out in Seton on Judgments, 6th ed. p. 2173.

[SWINFEN EADY J. In that case the trustees were asking for the direction of the Court.]

That is so, but the case shews that the rules constitute an instrument, and that a resulting trust may be dealt with on originating summons. A resulting trust is really a trust under the instrument: *Smith* v. *Cooke.* (2) Resulting trusts were dealt with on originating summons in *In re Abbott Fund Trusts* (3) and *In re Andrew's Trust.* (4)

The matter can also be dealt with under Order LIV.A, r. 1, which provides that "any person claiming to be interested under a deed, will, or other written instrument, may apply by originating summons for the determination of any question of construction arising under the instrument, and for a declaration of the rights of the persons interested." The word "instrument" in this rule applies to any written document: *Mason* v. *Schuppisser.* (5) The Court must look at the rules in order to see whether there is a resulting trust, or in other words whether the invalid parliamentary fund trusts are exhaustive. It can then declare the rights of the parties interested in the trust fund. If, however, there is any informality, it is purely technical, and the Court can allow the plaintiff to issue a writ to put the matter in proper form: *In re Bowes.* (6)

Hon. Frank Russell, K.C., and *P. B. Abraham*, for the defendants. In *In re Bowes* (6) the issue of the writ was evidently assented to by all parties. In the present case we do not assent, but insist on the preliminary objection. Assuming for the

(1) [1899] 2 Ch. 184.
(2) [1891] A. C. 297, 299.
(3) [1900] 2 Ch. 326.
(4) [1905] 2 Ch. 48.
(5) (1899) 81 L. T. 147.
(6) (1893) 38 Sol. J. 81.

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purposes of this argument that the rules constitute an instrument, the plaintiff is not a cestui que trust under the trust of that instrument. His claim is dehors the instrument. In other words he says that the parliamentary fund is not part of the trust estate, but belongs to him and the other contributors. In *In re Printers and Transferrers Amalgamated Trades Protection Society* (1) and *In re Abbott Fund Trusts* (2) the summons was issued by the trustees under the instrument, and in *In re Andrew's Trust* (3) it was issued by the beneficiaries under the trust. The question of jurisdiction was not raised, but even assuming an originating summons was the proper procedure in these cases, and not an action as in *Braithwaite* v. *Attorney-General* (4), they are no authority for the proposition that a person claiming dehors an instrument can enforce a resulting trust by originating summons. The plaintiff must bring himself within the exact words of Order LV., r. 3: *In re Giles.* (5) This he has not done. The true test is whether the plaintiff's claim could have been decided in an action to administer the trusts of the instrument: *In re Royle.* (6) Here the plaintiff claims against the instrument, and there is no jurisdiction on originating summons. Lord Halsbury's observations in *Smith* v. *Cooke* (7) were obiter and per incuriam. This resulting trust was not contemplated by the instrument, and the case does not fall within Order LV., r. 3: *In re Bowes.* (8)

Order LIV.A, r. 1, does not help the plaintiff. The trust is admittedly invalid, and no question of construction arises. The plaintiff is not a person interested under the instrument. The declaration of the rights of the persons interested is merely ancillary to the decision of the question of construction.

L. W. Byrne in reply. In *In re Bowes* (8) the Court was asked to determine what persons under the trusts of the trust deed or by the custom of the manor of Bowes were entitled to vote for the election of new trustee-lords of the manor. The election had in fact always been regulated by custom, and the deed contained no provision on the point. This was clearly not

(1) [1899] 2 Ch. 184.
(2) [1900] 2 Ch. 326.
(3) [1905] 2 Ch. 48.
(4) [1909] 1 Ch. 510.
(5) (1890) 43 Ch. D. 391, 398.
(6) (1889) 43 Ch. D. 18.
(7) [1891] A. C. 297, 299.
(8) 38 Sol. J. 81.

a case contemplated by the instrument. In the present case the fund is vested in the defendants. The plaintiff makes out his title in this way. He says "I paid this money to you as trustees of this instrument to hold on a trust that is invalid on the face of the instrument. You therefore still hold this money as trustees under the instrument and in a Court of Equity I am your cestui que trust under what is in reality the only trust of that instrument, namely, the resulting trust implied on failure of the declared trust." In other words the claim is "the declared trust has failed and the implied resulting trust has arisen." Surely this is a claim under and not against the trust of the instrument within the meaning of Order LV., r. 3.

SWINFEN EADY J. (after stating the facts). The question is whether the plaintiff has brought himself either within Order LV., r. 3, or Order LIV.A, r. 1. Order LV., r. 3, provides that "the trustees under any deed or instrument . . . . and any person claiming to be interested in the relief sought . . . . as cestui que trust under the trust of any deed or instrument" may take out an originating summons (inter alia) for the determination of any question affecting the rights or interests of the person claiming to be cestui que trust, the furnishing of accounts, payment into Court, or the determination of any question arising in the administration of the trust. The plaintiff contends that the rules of the society constitute an instrument, and the summons is intituled "In the matter of the trusts declared by the rules of the Amalgamated Society . . . . concerning a fund established for the maintenance of parliamentary representation." But treating the rules as an instrument, is the plaintiff a cestui que trust under the trust of that instrument? The trust of the instrument is to maintain parliamentary representation of railwaymen in the House of Commons. That trust cannot lawfully be carried out. The plaintiff does not claim under that trust at all, but under a resulting trust arising on failure of the trust of the instrument, by reason of its illegality. In my opinion the plaintiff is not a cestui que trust under the trust of any deed or instrument within Order LV., r. 3.

Order LIV.A, r. 1, is expressed in a different way. It provides

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that "any person claiming to be interested under a deed, will, or other written instrument, may apply by originating summons for the determination of any question of construction arising under the instrument, and for a declaration of the rights of the persons interested." In the present case no question of construction arises under the instrument. The trust of the instrument is clear. It is to maintain parliamentary representation of railwaymen in the House of Commons. That trust has been declared illegal, and no question of construction remains. The summons also asks for a declaration that the fund ought to be distributed among the contributors, an inquiry who are entitled, distribution, and other relief. But the declaration of the rights of the persons interested authorized by Order LIV.A, r. 1, is intended to follow on the determination of the question of construction, and there is no such question here. Even if any part of the summons could be dealt with under Order LIV.A, r. 1, the jurisdiction is discretionary under r. 4, and it would not be convenient to determine the matter partly on the summons and partly in an action. I therefore make no order on the summons. I will deal with the costs after I have heard the action. If no action is brought the defendants may apply.

Solicitors: *C. T. Wilkinson; Pattinson & Brewer.*

G. R. A.

WARRINGTON J.
1910
Oct. 25.

In re HURLBATT.
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[1910 H. 1023.]

Will — Construction — Accumulations — Leaseholds — Reserve Fund to meet Liabilities under Leases—Validity—Accumulations Act, 1800 (*Thellusson Act*) (39 & 40 *Geo.* 3, *c.* 98), *ss.* 1 *and* 2.

The testatrix bequeathed leaseholds to trustees upon trust that they should yearly during the residue of the terms of years for which she held the property reserve one fourth part of the net rents and annual profits thereof, and upon further trust to pay the remaining three fourths to her four nieces and her nephew; and she directed that the one fourth part thereinbefore directed to be reserved should once (or oftener if convenient) in every year be invested and that all dividends and interest arising from the investments should be added thereto by way of accumulation, and that the same and all accumulations thereof should be held as a reserve fund to indemnify her executors and trustees from all claims for dilapidations which might arise in respect of the leaseholds; and subject to such indemnity and claims upon trust for the equal benefit of her said four nieces and nephew in like manner as she had declared of the other three fourths of the rents and profits and to the end and intent that her said four nieces and nephew might have the benefit of an accumulated fund to meet the loss of income which would arise at the expiration of the leases of the property. The will also contained a residuary bequest.

The testatrix died in 1879, so that the twenty-one years allowed by the Thellusson Act for accumulations terminated in 1900. The last of the leases expired in 1909. One fourth of the rents and profits had been duly accumulated and the dilapidations had been paid for out of the fund:—

Held, following *Varlo* v. *Faden*, (1859) 27 Beav. 255; 1 D. F. & J. 211, that the trust to accumulate until the end of the terms was valid and did not come within the Thellusson Act.

THE testatrix Harriot Gray Hurlbatt bequeathed to her brother Charles Hampton Hurlbatt and to her nephews Francis Hurlbatt, William Hurlbatt, and Charles Hurlbatt, their executors, administrators, and assigns, all her leasehold messuages and hereditaments in the parish of St. Paul, Deptford, in the county of Kent, upon trust that they and the survivors or survivor of them should yearly during the residue of the terms of years for which she held the said leasehold premises reserve

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and retain for the purposes and subject to the directions hereinafter expressed and declared one fourth part of the net rents and annual profits which they should receive from her leasehold premises at Deptford after deducting outgoings as therein mentioned, and upon further trust to pay the remaining three fourth parts of the net rents and annual profits arising from the property unto her four nieces Elizabeth Mary Hurlbatt, Ellen Hurlbatt, Alice Hurlbatt, and Harriot Gray Hurlbatt and her nephew Charles Hurlbatt, and their respective executors and administrators, or for such of them as should be living at her decease, in equal shares as tenants in common, with certain provisions intended to take effect in the event of the death of any of them. And as to the said one fourth part of the rents and annual profits of her leasehold estate at Deptford thereinbefore directed to be reserved and retained by the trustees she directed that the same should once (or oftener if convenient) in every year be invested by the trustees as therein mentioned, and that the same moneys and the stocks, funds, or securities in or upon which such moneys should be invested and all dividends and interest arising therefrom should from time to time be added thereto by way of accumulation, and that the same and all accumulations thereof should be held as and for the purpose of a reserve fund to indemnify and save harmless her executors and the said trustees and other the trustees for the time being of the trust estate from all claims which might arise for dilapidations or otherwise in respect of the said leasehold premises at Deptford, and, subject to such indemnity and claims, upon trust for the equal benefit of her said four nieces and her nephew and their children in like manner as she had declared of the other three fourth parts of the said net rents and profits of the premises at Deptford and to the end and intent that her said four nieces and nephew or the survivors of them or their children might have the benefit of an accumulated fund to meet the loss or deficiency of income which would arise and accrue to them at the expiration of the leases of her said Deptford property. The testatrix also bequeathed to the same trustees her leasehold houses at Newington to be held upon similar trusts, except that in this

case she omitted the last sentence set out above which began with the words "to the end and intent" and concluded with "Deptford property." The will further contained a residuary bequest.

The testatrix died on June 21, 1879. Harriot Gray Hurlbatt died in 1882 intestate and a spinster. Elizabeth Mary Hurlbatt died in 1904, leaving a will. All the trustees except Charles Hurlbatt were also dead.

The period of twenty-one years (allowed by the Thellusson Act for accumulations) from the death of the testatrix expired in 1900, and before that time the last of the Newington leases had expired. The last Deptford lease expired in 1909. One fourth of the rents and profits of these houses had been regularly carried to a reserve fund as directed by the will and the income accumulated. All claims for dilapidations had been paid out of the fund, and it now amounted to about 1700*l.*

Several questions arose in the administration of the estate, and the surviving trustee took out this summons to determine, inter alia, the question whether the trust for accumulation was to any and what extent invalid, and, if so, whether part of the reserve fund belonged to the residuary legatees, or all of it belonged to the nieces and the nephew.

Christopher James, for Charles Hurlbatt, the sole surviving trustee and also a beneficiary. The trust to accumulate a reserve fund to indemnify the executors against liabilities under the leases is valid and does not come within the Thellusson Act: *Varlo* v. *Faden*. (1) Even if it is to any extent invalid, we submit on the construction of the will that the fund is divisible amongst the four nieces and the nephew and does not fall into residue.

C. W. Turner, for Arthur Hurlbatt, a beneficiary under the will of Elizabeth Mary Hurlbatt. I support the same contention. The fund was to be accumulated simply in order to keep up the property and not to add to it. The trust is therefore valid till the expiration of the last lease and is not within the Act: *In re Gardiner*. (2)

(1) 27 Beav. 255, 265; on appeal, 1 D. F. & J. 211.

(2) [1901] 1 Ch. 697.

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A. M. W. Wells and *W. P. Spens*, for other parties in the same interest.

A. Whitaker, for the residuary legatees. The trust to accumulate is within the mischief aimed at by the Act and came to an end at the expiration of twenty-one years from the death of the testatrix. The rents and profits are directed to be accumulated, and the beneficial enjoyment thereof is postponed. It is not within the exceptions contained in s. 2. These liabilities are not debts of the testatrix or of any other person; and the exceptions have never been held to apply to an indemnity fund in respect of leaseholds.

This was not a bona fide reserve fund within *Varlo* v. *Faden* (1) and *In re Mason*. (2) Therefore the surplus funds fall into the residue.

WARRINGTON J. The question in this case is whether the accumulations since the expiration of twenty-one years from the death of the testatrix pass under the residuary gift contained in the will or whether the fund arising from the accumulations belongs to the nieces and nephew under the specific disposition in their favour. The testatrix had two sets of leasehold properties with which this question is concerned, one consisting of a number of houses at Deptford, and the other of some houses at Newington. By her will she disposed of her property at Deptford as follows: [His Lordship read the provisions of the will, and continued.]

The testatrix disposed of her houses at Newington in almost the same terms, the only material difference being that she omitted the words which begin "and to the end and intent"; i.e., that she stopped at the words "leasehold premises at Deptford." The first question which arises is whether the trust for the accumulation of this one fourth part of the rents and profits as and for the purposes of a reserve fund to indemnify the executors and trustees against their liabilities for dilapidations under the leases of the houses at Deptford and Newington is to any extent void under the provisions of the Thellusson Act, which makes

(1) 27 Beav. 255, 265; on appeal, 1 D. F. & J. 211.

(2) [1891] 3 Ch. 467.

void all accumulations beyond a certain period allowed by the Act. Sect. 2 contains this provision: "provided always, and be it enacted, that nothing in this Act contained shall extend to any provision for the payment of debts of any grantor, settlor, or devisor, or other person or persons . . . ." The first question is whether this is a provision for the payment of the debts of "the devisor or any other person or persons." It is curious that the question of provision for liabilities arising under leases has never actually arisen for decision, but in *Varlo* v. *Faden* (1) Romilly M.R., in dealing with the question which arose in that case, which was of a rather different nature, put the very point. In the case before him the object of the accumulations was protection against liabilities under shares in the *Globe* newspaper, and it appeared that under the partnership articles the testator might be under considerable liability in respect of them. The Master of the Rolls said this: "The question that arises is really this:—Whether an accumulation for an indemnity fund to protect the property of the testator is within the Thellusson Act or is not. This is strictly a case of that description, everything above 200*l.* a year is to accumulate for the purpose of protecting the shares during the life of the legatee for life. Protecting the shares, I think, means this:—That if there should be any unexpected call on the shareholders, in respect of the partnership, by reason of which, if there were no indemnity fund, some of the shares must be sold: this indemnity fund is applicable to meet that call. It appears to me to be analogous to a case of this description:—If a testator, for instance, who had a long leasehold, of which there were thirty years to run, after his death, directed, by his will, that a certain portion of the rents should be laid out every year to accumulate at compound interest, for the purpose of meeting any liabilities which might ultimately fall on his estate at the termination of the lease, in respect of the covenants contained in it, I think, that within the limits which the law allows, that would be good, notwithstanding the Thellusson Act, and I think that the exception contained in the Thellusson Act allows of that accumulation to be made, and that the expression 'debts of

(1) 27 Beav. 255, 265.

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any other person or persons' must mean the liability which would fall on some one to discharge these particular obligations which would affect the property in the event contemplated by the testator. No doubt it must be bona fide; it must not be merely colorable for the purpose of evading the Act, and the Court would have to determine that question when it arose. But in this case, I think there is no doubt about the bona fides, and I am of opinion that the accumulations are good. If the shares be now sold, the accumulations will not be required any longer. I decided, at the hearing, that the widow was not entitled to the amount of the accumulations; but I am of opinion that she is entitled to the interest to be derived from the accumulated fund. The executors must be protected against any liabilities which they may have incurred or which they may be liable to hereafter; but as this fund will remain in Court, that will be sufficient to protect them." He did not seem to think it material to consider or ascertain whether or not at the end of the twenty-one years a further accumulation was required for the protection of the executors against liabilities under the shares. That came before Lord Campbell on appeal (1), and he affirmed the decision, although he did not deal with the example which the Master of the Rolls had given. The Master of the Rolls had dealt with it as a perfectly plain case, and it seems to me that on the authority of that case the Court ought to hold that, where the purpose of the accumulation is bona fide to create a fund to protect the trustees against uncertain claims for dilapidations under a lease, the trust to accumulate is not within the Thellusson Act at all. It has been contended that the exceptions of the 2nd section only apply, if at all, so far as the accumulation is for the purpose of indemnity, and that if the testator expresses any other purpose, then the Act will apply to accumulations for that purpose. In the present case it is unnecessary to determine that question. In the rather peculiar case before Stirling J., *In re Mason* (2), the learned judge took the view that a trust for accumulation was valid so far as it was a bona fide provision for the performance of trusts for rebuilding, repairing,

(1) 1 D. F. & J. 211. (2) [1891] 3 Ch. 467.

and reinstating buildings, and that it was not a direction to accumulate within the Thellusson Act at all, but that when the purposes were fulfilled, the general trust to accumulate did fall within the Act. I, however, have to determine whether the direction to create this reserve fund is made otherwise than bona fide by the addition to it of another purpose, namely, of trusts of the fund thus formed. I am of opinion that it is not. It was impossible for the testatrix to know what would be the amount of the dilapidations, and she has only said what is to be done with the fund subject to providing for that liability. I do not think that makes the direction to indemnify the trustees less bona fide. It is said that I cannot take that view because the testatrix has not said the beneficiaries are to take subject to a legal accumulation, but has expressly postponed the interest of the legatees till a time which may be after the expiration of the twenty-one years. I do not think the question really arises. This accumulation is not within the Act at all. By the will the whole fund consisting of rents and profits by accumulation or otherwise is to be accumulated, and afterwards, subject to the indemnity, is to go to the persons to whom the rest of the rents and profits go. I think the words "to the end and intent that her said four nieces and nephew or the survivors of them or their children might have the benefit of an accumulated fund to meet the loss or deficiency of income which would arise and accrue to them at the expiration of the leases of her said Deptford property" are merely the expression of the motive or reason for the trust which the testatrix was declaring. I think the trust is valid for the whole term of the leases, but whether that be so or not the surplus rents go to the persons entitled to the three fourths of the rents and do not go under the residuary gift. The question of the Newington rents is simpler because those leases terminated within the period of twenty-one years from the death of the testatrix, and the testatrix omitted in their case the clause beginning "to the end and intent."

Solicitors: *Trinder, Capron & Co.; W. Easton & Sons.*

H. C. R.

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July 11, 12, 13, 14, 15, 18, 19, 29.

ATTORNEY-GENERAL *v.* WEST HAM CORPORATION.

[1908 A. 1891.]

Local Government—Municipal Corporation—Urban Authority—Borrowing Powers—Overdraft—Power to borrow for specific Purposes—General Overdraft—Interest—Power to use Consolidated Loans Fund for fresh Loans—Ultra vires.

The defendant corporation had statutory powers to borrow money with the sanction of the Local Government Board for the purposes of several undertakings which they were authorized to carry on, including the supply of electricity and electrical fittings and the construction and working of electric tramways. The corporation in 1905 applied to their bank for and obtained leave to overdraw their general account to the extent of 120,000*l.* for six months. The overdraft was allowed on the security of their unexhausted borrowing powers. At this time they had applied for but not yet obtained the sanction of the Local Government Board to a large loan for the purposes of their electricity undertaking. This sanction was afterwards obtained. The overdraft was renewed from time to time for different amounts. At the commencement of this action the limit stood at 50,000*l.*, and before the hearing the overdraft was paid off altogether. The moneys received from the overdraft were paid into the corporation's general account and applied for the purposes of all their undertakings indiscriminately:—

Held, that this borrowing by way of overdraft was illegal.

The corporation were bound by their private Acts to pay every year into an account called the consolidated loans fund sufficient moneys to provide for the interest and instalments of principal to be repaid in respect of all their loans, which were raised by the issue of stock. But they had power when a fresh loan was authorized to borrow from the consolidated loans fund instead of issuing fresh stock. They applied the whole of the consolidated loans fund in reducing their overdraft in anticipation of the assent of the Local Government Board to fresh loans:—

Held, that this application of the consolidated loans fund was illegal.

This action was brought on December 7, 1908, by the Attorney-General against the Corporation of West Ham and their borough treasurer and the London and County Bank asking for declarations that certain overdrafts allowed by the defendant bank to the corporation, and dealings by the corporation with their consolidated loans fund, were ultra vires and illegal, and for injunctions and consequential relief against the corporation, and

repayment to the corporation by the defendant bank and the borough treasurer of all interest paid in respect of the overdrafts complained of.

The relators, an india rubber company, were large ratepayers in the borough.

The West Ham Corporation had statutory powers, among others, to supply electricity and construct and manage electric or other tramways, and for the purposes of these and other undertakings had extensive borrowing powers. These borrowing powers could in most instances only be exercised with the sanction of the Local Government Board. The corporation kept ten different accounts with the defendant bank, but account No. 1, called the general account, was the only one discussed in this action. To this general account the corporation paid in all receipts of capital or revenue in respect of the borough fund, the general district rate, their electricity and tramway undertakings, the consolidated loans fund, and several other matters for which they kept separate accounts in their own books. They drew upon this general account indiscriminately for their expenditure both for capital and revenue in respect of all these matters. They had a pass-book with a column both on the credit and debit sides, headed "Bankers' Column," in which all the receipts and payments were entered by the bank in the usual way. It also contained a number of other parallel columns headed with the names of the different undertakings and matters referred to. To these separate columns the receipts and payments appearing in the bankers' column were afterwards carried by the borough treasurer, the pass-book being periodically returned to him for that purpose. There was much discussion as to whether this method of keeping the accounts fixed the bank with notice of how the moneys drawn out were applied, but as the case against the bank was settled by agreement, this question was not decided.

The corporation from time to time obtained a general overdraft from the bank by representing, as the fact was, that they had unexhausted borrowing powers exceeding the overdraft, out of which they undertook to repay the bank. Most of these powers, however, and especially the power to borrow for their

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electrical undertaking, could only be exercised with the sanction of the Local Government Board. This sanction had been applied for but not obtained when the overdraft was allowed.

The overdrafts granted by the bank were usually for short terms and varied in amount, but they were always allowed on the general account, and not for any special purpose or undertaking. In May, 1905, liberty was given by the bank to the corporation to overdraw for six months up to 120,000*l*. This was gradually increased until on November 7, 1905, the amount was fixed at 200,000*l*., but only allowed till February 14, 1906. From this time the overdraft was gradually reduced by the payment in of authorized loans or otherwise. On May 2, 1908, the limit was fixed at 50,000*l*., the overdraft being extended for six months, and this limit was apparently in force when the action was commenced on December 7, 1908. Before the hearing the overdraft had been paid off and the corporation's general account was in credit.

The "consolidated loans fund," the dealing with which was complained of, was constituted by the West Ham Corporation (Loans) Act, 1888 (51 & 52 Vict. c. cxlii.). Sect. 9 provided, "(1.) In each year the corporation shall pay into the loans fund a sum or sums equal to the aggregate amount of all sums payable in that year for redemption and extinction or purchase and extinction of the several portions of the corporation stock issued in exercise of the respective statutory borrowing powers of the corporation and remaining outstanding."

Sub-ss. 2 and 3 provided for raising these sums by contributions from the different revenues of the corporation, and for fixing the amount of such contributions.

"(4.) The corporation shall from time to time by investment on statutory securities of the sums paid into the loans fund in respect of those several contributions or of proper parts thereof and by like investment of the interest and annual proceeds arising from those securities make and maintain such accumulations as are in this section referred to."

By the operation of s. 12 of this Act as amended by the West Ham Provisional Order of 1901 (confirmed by the Local

Government Board's Provisional Orders Confirmation (No. 12) Act, 1901) the application of the loans fund was to be as follows:

"12.—(1.) The corporation shall from time to time apply the loans fund first in paying the dividends on all corporation stock and next in redeeming corporation stock according to the terms of issue and purchasing corporation stock for extinction.

"(2.) Where the corporation are authorised by any statutory borrowing power to raise money for any purpose the corporation instead of exercising the statutory borrowing power by the creation and issue of additional corporation stock may exercise the statutory borrowing power wholly or partially by using for such purpose any moneys for the time being forming part of the loans fund and not required for the payment of dividends on corporation stock."

On March 31, 1908, the end of the last complete financial year of the corporation before action commenced, the corporation's pass-book shewed in the electricity account an overdraft of 44,000*l.* in respect of revenue and 90,000*l.* in respect of capital. On the same date the general account in the bankers' columns shewed an overdraft of 39,000*l.* only; this balance was arrived at by adding together all the sub-accounts above mentioned and setting off the credit balances on some of these against the overdrafts in others, including in the credit balances so set off a sum of 99,000*l.* standing to the credit of the consolidated loans fund. The evidence shewed that the total of the overdrafts on the different accounts, above the loans sanctioned by the Local Government Board, was 148,000*l.*, but this included the whole of the 90,000*l.* overdrawn on the electricity capital account. The statement of claim asked for a declaration that 20,000*l.* of this 90,000*l.* and the whole of the 44,000*l.* overdrawn upon revenue account were illegally borrowed; and that the balances of the consolidated loans fund were separate trust funds and could not legally be set off against the overdrafts in other accounts, but ought to have been invested as required by the Act.

After the close of the arguments the claim against the bank was settled on the terms of their paying to the corporation an

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agreed sum for interest paid to them in respect of the overdrafts. The arguments against and for the bank are therefore omitted.

Sir Alfred Cripps, K.C., and *Joshua Scholefield*, for the Attorney-General. The general nature of our claim against the corporation is that they have dealt illegally and improperly with funds in relation to which they are in the position of trustees. They have used funds which by statute have been definitely limited to specific purposes for purposes other than those which were allowed. This is of special importance under two heads, the electricity account and the sinking fund, referred to as the consolidated loans fund. As regards the electricity account large sums have been expended both for capital and for revenue purposes without any authority whatever. To meet these and other expenses the corporation obtained large overdrafts from the bank. As security for these overdrafts they purported to pledge to the bank all the borrowing powers they had for any purpose, but this they had no power to do, especially as some of the borrowing powers were only exercisable with the sanction of the Local Government Board, and this, at the time the overdrafts were allowed, had not been obtained.

As to the sinking fund, it had to be invested in outside securities. At the crucial date here, the end of March, 1908, the sinking fund amounted to 99,000*l.*, and not one penny had been so invested. It is suggested that the corporation had power to use the sinking fund instead of issuing new stock, but this had not been done; it was merely set off against the overdraft due to the bank.

It is settled law that a corporation cannot borrow by overdraft except for merely temporary purposes, and a borough treasurer has been held liable to repay the interest which was paid to him as manager of a bank: *Attorney-General* v. *De Winton.* (1) *Smith* v. *Southampton Corporation* (2) shews that a corporation cannot escape from the rule that all its debts must be paid within six months by borrowing on overdraft and carrying to a suspense account. A rate to repay such overdraft is

(1) [1906] 2 Ch. 106. (2) [1902] 2 K. B. 244, 251.

illegal. *Reg.* v. *Reed* (1) decided that an overdraft by a school board was an illegal borrowing. In *Attorney-General* v. *Tottenham Urban Council* (2) the council had spent on municipal buildings more than the loan authorized and afterwards obtained the sanction of the Local Government Board to borrow part but not the whole of the difference. They were restrained from making a rate to repay the part still unsanctioned; but the question of interest on the part borrowed without sanction and afterwards sanctioned was not decided. *Rex* v. *Locke* (3) decides that a corporation cannot borrow money except for a merely temporary purpose without executing a mortgage of the rates as required by s. 223 of the Public Health Act, 1875.

[NEVILLE J. There the sanction was to borrow in a particular way.]

The sanctions here are all in the same form, to borrow by mortgage of the rates. *Attorney-General* v. *Belfast Corporation* (4) is on all fours with this case, and there the corporation was held to be a trustee of each separate fund. As to the consolidated loans fund, it is plain that the corporation did not exercise properly any power to use it as part of a loan, but if the money is there we shall not complain.

[At the close of the plaintiff's argument the claim for repayment against the borough treasurer was withdrawn, and it was stated that the plaintiff would not press his claim for any pecuniary relief against the corporation, but only ask for a declaration that their proceedings were illegal, and an injunction against their paying any interest at all, or repaying any principal moneys unless and until sanction for the loan was obtained.]

Danckwerts, K.C., Edward Morten, K.C., and *Tomlin*, for the corporation. It is admitted that there has in this case been nothing in the nature of dishonest dealing with the moneys, and that all the overdrafts have been created solely by cheques drawn in favour of lawful creditors of the corporation. The Attorney-General's case is founded on technicalities only. The relation between the banker and the customer is in no way fiduciary, it is simply that of debtor and creditor. When the

(1) (1880) 5 Q. B. D. 483.
(2) (1909) 73 J. P. 437.
(3) [1910] 2 K. B. 201.
(4) (1855) 4 Ir. Ch. Rep. 119.

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payment of a cheque produces an overdraft it makes the bank a creditor, but if it is used to pay a creditor an existing debt, there is no borrowing in the proper sense; there is merely a transposition of creditors. *In re Wrexham, Mold and Connah's Quay Ry. Co.* (1) shews that where the liability is not increased there is no illegal borrowing. That appears very clearly in the judgment of Lindley M.R. So soon as the money was paid the bank became a creditor of the corporation, and a rate could have been levied to pay the bank any time within six months. It could not be done afterwards, but if at any time afterwards the corporation obtained a sanction for a loan to pay the original creditor with, there was nothing to prevent their paying the bank out of it. This is what they did. We are not now on the question of interest. This point was not argued or decided in any of the cases. The same principle of substitution of creditors was applied between individuals in *Bannatyne* v. *MacIver*. (2) It was also discussed and applied in *In re Johnston Foreign Patents Company*. (3) The principle was applied by Hamilton J. in *London and Provincial Bank* v. *Tottenham Urban Council* (4), where judgment was given against the urban district council for the balance of money expended by them in building a town hall over and above the amount of a loan which was sanctioned after the money was expended.

As to an injunction, *Attorney-General* v. *Birmingham, Tame, and Rea District Drainage Board* (5) shews that the Attorney-General is not entitled to an injunction as a matter of right, and the Court can only grant an injunction if satisfied that the corporation have done an illegal thing and intend to continue doing it. It is plain that there is no such intention.

As to interest, the corporation were entitled to employ a banker and to pay for his services; that would justify a part of the interest. The rest is justified because the bank as already shewn were creditors, and any creditor might by notice have required payment of interest, and the corporation could waive the actual service of notice.

(1) [1899] 1 Ch. 440.
(2) [1906] 1 K. B. 103.
(3) [1904] 2 Ch. 234.
(4) Not reported.
(5) [1910] 1 Ch. 48

As to the consolidated loans fund, it was always intended to use this as part of the loans. The only objection taken is that the money was not invested during the interval between applying for the sanction of the Local Government Board and obtaining it. It was not practical business to invest it when the sanction might come any day.

Buckmaster, K.C., and *T. T. Methold*, for the bank.

Sir A. Cripps, K.C., in reply.

After the conclusion of the arguments and evidence the case against the bank was settled as above mentioned.

Cur. adv. vult.

July 29. NEVILLE J. In this case the Attorney-General sues the Corporation of West Ham to put an end to alleged illegality on the part of the corporation in the conduct of the businesses entrusted to them by the Legislature. The statutory powers of the corporation include the supply of electricity and of electrical fittings. For these and other purposes they have been entrusted with extensive powers of borrowing in some instances (including their electrical undertaking) to be exercised with the sanction of the Local Government Board. The corporation had ten different accounts at their bankers', into one of which, the general account, they paid all receipts on account of the borough fund and the general district rate, and upon which they drew in respect, amongst other things, of their expenditure upon their electrical undertakings. The corporation kept in their books two electricity accounts, one called the "capital account," dealing with expenditure on fixed capital, and the other the "revenue account," which, besides shewing the surplus or deficiency in the year's working, included their expenditure upon electrical fittings and stores. For the latter they had borrowing powers to be exercised with the sanction of the Local Government Board, but they had not on March 31, 1908, obtained any such sanction. Any deficiency upon the year's working was estimated for in the rate for the following six months and levied; but no estimate was made in respect of the capital expenditure upon the electrical undertaking, whether fixed or floating. This was provided for

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either from other funds of the corporation not properly applicable for that purpose or by overdraft from the bank. On March 31, 1908, the overdraft on the electricity revenue account was over 44,000*l.*, and on the capital account over 90,000*l.* In my opinion these overdrafts were illegal. Towards the end of 1905, by this and other expenditure made for legitimate purposes, but which was intended to be met out of funds to be produced by the exercise of their borrowing powers and for which consequently no estimate was made or rate levied, the corporation had got themselves into considerable financial difficulties and were unable without financial assistance to provide for their current expenditure. They had at this time unexhausted borrowing powers which (upon the sanction of the Local Government Board being obtained) would, if exercised, have to some extent enabled them to recoup their expenditure upon capital account, and in the month of December, 1905, they applied for sanction to borrow moneys in respect of certain works. It is only fair to the corporation to say that the sanction which was ultimately given in respect of the greater part of their application was not so given until April 18, 1908, and this delay undoubtedly added to their embarrassment and tended to prolong the period during which they sought assistance. In this state of affairs the corporation in the month of November, 1905, applied for an overdraft to the defendant bank, and after some negotiation an overdraft was granted to the extent of 120,000*l.*, subsequently increased to 200,000*l.*; from the time when the overdraft was granted until shortly before the commencement of the action their accounts were almost continuously overdrawn. At the time the corporation obtained the overdraft they had unexhausted borrowing powers, and I will assume that these were in excess of the overdraft, though the evidence is somewhat meagre on the point. The corporation appear to have considered that they were entitled—they certainly acted as if they were—to use moneys borrowed under specific powers not merely for the specific purposes for which the powers were bestowed, but for any purpose to which any funds of the corporation could lawfully be applied, so long as they kept proper accounts of the expenditure. I think the correspondence and applications to the bank shew that they

intended so to apply the bank's advances from the first. And in fact the overdraft was allowed on all the accounts and a general balance struck daily upon them all. In my opinion this view of the position of the corporation was erroneous. I think if they raised moneys under a borrowing power they were bound to apply the moneys so raised for the specific objects indicated by the statute. I think upon this ground the obtaining of the overdraft was ultra vires of the corporation. Whether an overdraft extended over several years for substantially the whole amount of the authorized loan could be justified as a temporary loan within the meaning of the decisions I need not decide, but in my opinion the question is at least doubtful. Upon the point whether, having regard to the statutory provisions under which corporations are enabled to procure the funds to discharge their liabilities, they are entitled to borrow money by way of overdraft for general expenditure, at all events except under special circumstances, I also reserve my decision.

The impropriety of municipal corporations incurring large expenditure on capital account in anticipation of sanction for loans not yet obtained is well illustrated in the present case, where the corporation failed to obtain sanction for a loan in respect of an expenditure of over 10,000*l.* on electricity account, with the result that they were driven to make a levy for the amount: in my opinion an illegal levy, inasmuch as the proceeds were applied in payment of liabilities incurred more than six months before the levy of the rate.

The bank having agreed terms with the plaintiff, I refrain from discussing what upon the evidence their position would have been in respect of their advances.

On March 31, 1908, the general account of the corporation with the bank was largely overdrawn to the extent of some 39,000*l.* after deducting the amount due to the consolidated loans fund, but which had from time to time been paid into the account in reduction of the overdraft in accordance with an arrangement with the bank. In my opinion the application of the amounts due to the consolidated loans fund in reduction of the overdraft was illegal.

At the trial application was made for leave to plead the Public

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Authorities Protection Act of 1893 and the Trustee Relief Act, 1888. In the course of the trial I gave such leave, subject to all questions of costs and adjournment, and the matter proceeded upon that footing. Counsel for the Attorney-General having refrained from asking for relief against the defendant Paterson personally, the Trustee Relief Act can have no application. The question of the applicability of the Public Authorities Protection Act of 1893 was not fully argued. In my opinion, however, it would apply in favour of the corporation and the borough treasurer in respect of acts completed more than six months before action. The overdraft, however, from the bank and repayments out of moneys due to the consolidated loans fund continued up to a period within six months before the commencement of the action, and I think the plaintiff is entitled to declarations in respect of such continuing illegality. Although the plaintiff is not entitled to all the relief claimed, I think that, having regard to the time at which the application to amend was made, this should make no difference as to the incidence of the costs of the action.

I propose to declare:

1. That the overdraft obtained from the bank for general purposes in respect of borrowing powers granted for specific purposes was ultra vires and illegal.

2. That the application of money due to the consolidated loans fund in the payment of such overdraft was ultra vires and illegal.

3. That the borrowing of money from the bank for the purpose of the electricity accounts otherwise than in the exercise of borrowing powers with the sanction of the Local Government Board was ultra vires and illegal.

The defendants the corporation and the defendant Paterson must pay the costs of the action.

Solicitors: *Elvy Robb & Welch; Hillearys; Donald McMillan & Mott.*

J. R. B.

In re ROBINSON.
CLARKSON *v.* ROBINSON.

[1896 R. 491.]

NEVILLE J.
1910
Oct. 19, 20, 27.

Money-lenders—Register — Firm Name — Partners' Names — Real Partner's Name not registered—Securities void—Assignee for Value without Notice —Money-lenders Act, 1900 (63 & 64 *Vict. c.* 51), *ss.* 1 (5.), 2, 3.

In the register under the Money-lenders Act, 1900, the names of C. A. Bond and J. C. Bennet were entered as money-lenders trading in the firm name of Lewis & Co. and their names were also entered as constituting the individual members of the firm. C. A. Bond was not, in fact, a member of the so-called firm, but was merely the nominee or agent of one G. C. Bond, who found all the capital:—

Held, that securities taken in the individual names of C. A. Bond and J. C. Bennet or either of them, or in the name of Lewis & Co., were illegal and void under ss. 2 and 3 of the Act.

Held, also, that a bona fide purchaser for value of the securities without notice of the defect in the registration of the firm was in no better position.

This was an action commenced in 1896 by the trustees of the will of the late Peter Robinson to administer his estate and the trusts of his will, and by the judgment dated December 17, 1898, usual accounts and inquiries were directed. The testator by his will directed that his residuary estate should be held in trust for such of his children named in his will as being males should attain the age of twenty-five years, or being females should attain that age or marry, in equal shares.

Edward Robinson, one of such children, attained his age of twenty-one years on September 18, 1901, and between that date and September 18, 1906, when he attained twenty-five years, he created numerous charges on his contingent share in the testator's residuary estate in favour of various money-lenders. In August, 1903, he married, and on the occasion of his marriage he settled the greater part of his contingent share upon usual trusts for the benefit of himself and his wife and their issue subject to existing incumbrances.

By the order made on July 24, 1906, on the further consideration of the action an inquiry was directed as to the incumbrances

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on Edward Robinson's share and their respective priorities. Under this inquiry a claim was lodged (amongst others) by the Capital and Counties Bank as the assignees for value of four mortgages created by Edward Robinson in favour of Lewis & Co., a firm of money-lenders. "Lewis & Co." was the registered trade name of the firm, and the names of the individual members of the firm were entered in the register as "Charles Alfred Bond and John Colin Bennet carrying on the business of money-lenders at 5, Park Street, Nottingham."

The first mortgage was dated April 8, 1903, and was taken in the names of "Charles Alfred Bond and John Colin Bennet of 5 Park Street in the city of Nottingham."

The second mortgage was dated April 15, 1903, and was taken in the name of "John Colin Bennet of Brooklyn, Denton Boulevard, in the city of Nottingham."

The third mortgage was dated May 12, 1903, and was taken in the names of "Charles Alfred Bond and John Colin Bennet trading under the registered name of Lewis & Co. at 5 Park Street in the city of Nottingham."

The fourth mortgage was dated March 25, 1904, and was taken in the name of "Lewis & Co. of 5 Park Street, Nottingham."

By deeds dated April 3, 1905, and March 25, 1907, Lewis & Co. assigned the four mortgages for value to the Capital and Counties Bank, who, whilst the inquiry was proceeding, transferred them for value to a Mr. Grover and a Mr. Dicksee.

In April, 1907, Edward Robinson was adjudicated a bankrupt, and Dicksee became the trustee in bankruptcy.

Charles Alfred Bond and John Colin Bennet were cross-examined on the claim, when it transpired for the first time that Charles Alfred Bond was not a member of the firm of Lewis & Co., but merely the nominee of his brother, George Cresswell Bond, who supplied all the capital of the firm.

In July, 1910, the Master filed his certificate in answer to the inquiry, whereby he disallowed the claim on the ground that Lewis & Co. were not duly registered under the Money-lenders Act, 1900. Grover took out a summons to vary the certificate by placing his name and that of Dicksee on the list of incumbrancers on Edward Robinson's share by virtue of the four

mortgages in question. This summons was adjourned into Court and now came on for hearing with the adjourned further consideration of the action.

Jenkins, K.C., and *MacSwinney*, for the plaintiffs.

Mr. Grover, in person, submitted that he was a purchaser for value without notice, or that at any rate he was entitled to stand in the shoes of the bank, who were assignees of the four mortgages for value without notice of any defect in the registration of the firm of Lewis & Co.

Cozens-Hardy, for Dicksee, supported this contention.

Levett, K.C., and *T. L. Wilkinson*, for the trustees of the marriage settlement. The finding of the Master is right. The regulations of the Inland Revenue Commissioners under s. 3 of the Act require registration not only of the firm name, but also of the names of the individual members of the firm. Here Charles Alfred Bond was a mere dummy, or at most the agent of George Cresswell Bond, the real money-lender, who is not registered either in his own name or as a member of the firm as required by ss. 2 and 3 of the Act. Therefore the securities are illegal and void—*Victorian Daylesford Syndicate, Ld.* v. *Dott* (1); *Bonnard* v. *Dott* (2); *Stirling* v. *Silburn & Pyman* (3); *Ex parte Carden* (4); *Whiteman* v. *Sadler* (5)—and Grover cannot recover under them. The plea of purchaser for value without notice only applies under s. 1, sub-s. 5, to the "foregoing provisions" of that section where the deed is valid but the transaction is opened on other grounds.

Mr. Grover replied.

Butcher, K.C., and *Greaves, T. B. Napier, Tomlin, Percy Wheeler*, and *E. Knowles Corrie*, for other parties interested in Edward Robinson's share.

Cur. adv. vult.

Oct. 27. NEVILLE J. This is a summons for rectification of the Master's certificate disallowing claims to certain securities for some 40,000*l.* given by the bankrupt Edward Robinson to

(1) [1905] 2 Ch. 624, 628.
(2) [1906] 1 Ch. 740.
(3) [1910] 1 K. B. 67.
(4) (1903) 52 Sol. J. 209.
(5) (1910) 26 Times L. R. 655; since reported [1910] A. C. 514.

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money-lenders and assigned to the applicant. The first security was given to Charles Alfred Bond and Bennet, the second to Bennet, and the third and fourth to Lewis & Co.

Lewis & Co. were registered as a firm of money-lenders, the registration stating that the persons of whom the firm consisted were John Colin Bennet and Charles Alfred Bond. In my opinion there was in fact no such firm. George Cresswell Bond, the brother of Charles Alfred Bond, and Bennet carried on a money-lending business under the firm of Lewis & Co., and it was with this firm that Edward Robinson dealt. The evidence of Bennet and Charles Alfred Bond is in contradiction on this point. George Cresswell Bond gave no evidence. I think that Charles Alfred Bond's evidence was unworthy of credit and that Bennet's evidence must be preferred. Charles Alfred Bond and Bennet were not registered except as the alleged partners in the firm of Lewis & Co. I think, therefore, that the securities taken in their names were within the prohibition of s. 2, sub-s. 1 (*e*), of the Money-lenders Act, 1900. With regard to the securities taken in the name of Lewis & Co., in respect of transactions with George Cresswell Bond and Bennet, I think this firm was unregistered, and that these securities also are in the same position. I think, therefore, that, in accordance with the decisions of Buckley J. in *Victorian Daylesford Syndicate, Ld.* v. *Dott* (1) and the Court of Appeal in *Bonnard* v. *Dott* (2), approved on this point by the House of Lords in *Whiteman* v. *Sadler* (3), all these securities are void.

I had not the advantage of hearing the applicant's case argued by counsel, and I reserved judgment to consider in the first place whether, if the applicant could shew that he or any one through whom he claimed was a bona fide assignee or holder for value without notice of the want of registration, his claim could succeed. Having considered the cases, I have come to the conclusion that he could not. It therefore becomes immaterial to consider what his position in that regard was. In *Fergusson* v. *Norman* (4) it was held that a pawnbroker not complying with

(1) [1905] 2 Ch. 624.
(2) [1906] 1 Ch. 740.
(3) 26 Times L. R. 655; since reported [1910] A. C. 514.
(4) (1838) 5 Bing. N. C. 76.

the Pawnbrokers Act acquires no property in the pledges and cannot maintain a lien upon them; and I am satisfied that the decisions referred to proceeded upon the footing that the contracts were void, and not upon a mere personal incapacity in the offender to sue. The result is to leave those who choose to take assignments from money-lenders in a position of great peril. An intention on the part of the Legislature to discourage such assignments might well have been understood, but such intention is negatived by the fact that under s. 1 of the Act the rights of bona fide assignees are carefully preserved, and it would almost seem that the effect of the prohibitions in s. 2 of the Act was not fully realized. The only matter I have before me is the summons to vary, and this must be dismissed, the applicant to pay the costs of the parties served with the summons.

Solicitors for plaintiffs: *Capron & Co.*

Solicitors for marriage settlement trustees: *Lidiard, Son & Baker.*

Solicitors for other parties interested: *Colyer & Colyer; Bircham & Co.; Jaques & Co.; Pritchard, Englefield & Co.; Walker, Son & Field.*

H. L. F.

END OF VOL. II.

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Testator devised his real estate to trustees to the use of his wife for life and after her decease to the use of the first and every other son of his son H. successively in tail male with divers remainders over, and he directed that during a certain period the trustees should accumulate the rents and profits of his real estate and hold the same and the accumulations thereof upon trust for the person or persons who at the expiration of the said period should "under the trusts and limitations of this my will be entitled to the possession and enjoyment" of his real estate.

Upon the death of the testator's widow the first tenant in tail executed a disentailing assurance, and, although the period of accumulation had not expired, claimed to be entitled to the receipt of the rents and profits of the estate and to the accumulations :—

Held, that before the disentailing deed the plaintiff was in possession and enjoyment of his estate tail under the limitations of the will subject to the trust for accumulation, and notwithstanding the disentailing deed he was still in possession under the limitations of the will although he had become owner in fee; that upon the cesser of the period of accumulation he, his heirs or assigns, would be entitled under the limitations of the will, and no one else could be so entitled; and that consequently the trust for accumulation could no longer be enforced, and he was entitled to be let into possession. *In re* TREVANION. TREVANION v. LENNOX
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The testatrix bequeathed leaseholds to trustees upon trust that they should yearly during the residue of the terms of years for which she held the property reserve one fourth part of the net rents and annual profits thereof, and upon further trust to pay the remaining three fourths to her four nieces and her nephew; and she directed that the one fourth part thereinbefore directed to be reserved should once (or oftener if convenient) in every year be invested and that all dividends and interest arising from the investments should be added thereto by way of accumulation, and that the same and all accumulations thereof should be held as a reserve fund to indemnify her executors and trustees from all claims for dilapidations which might arise in respect of the leaseholds; and subject to such indemnity and claims upon trust for the equal benefit of her said four nieces and nephew in like manner as she had declared of the other three fourths of the rents and profits and to the end and intent that her said four nieces and nephew might have the benefit of an accumulated fund to meet the loss of income which would arise at the expiration of the leases of the property. The will also contained a residuary bequest.

The testatrix died in 1879, so that the twenty-one years allowed by the Thellusson Act for accumulations terminated in 1900. The last of the leases expired in 1909. One fourth of the rents and profits had been duly accumulated and the dilapidations had been paid for out of the fund :—

Held, following *Varlo* v. *Faden*, (1859) 27 Beav. 255; 1 D. F. & J. 211, that the trust to accumulate until the end of the terms was valid and did not come within the Thellusson Act. *In re* HURLBATT. HURLBATT *v.* HURLBATT – – – **Warrington J. 553**

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Funds given by a testator for a particular charitable purpose cannot be applied cyprès by the Charity Commissioners or the Court unless it is shewn to be impossible to carry out the testator's intention. They cannot be so applied because the Commissioners think some other scheme will be more beneficial than the testator's.

The Court will not overrule the Commissioners on matters of detail, but will restrain them from carrying out a scheme which is ultra vires.

A testator who died in 1902 devised to his trustees two houses upon trust to use house A. as a dispensary, cottage hospital, or convalescent home or other medical charity, to be called the Weir Hospital, for the benefit of the inhabitants of the parish of Streatham and the neighbourhood until a restrictive covenant which prevented the house B. (in which he resided) from being so used had expired, and then to use house B. in conjunction or not with house A. for the same purpose; and he gave his residuary personal estate to the same trustees for the maintenance of the hospital.

The trustees established a dispensary at the house A. and maintained it until the covenant expired in 1907. The funds then applicable for the maintenance of the charity were about 100,000*l.* The Charity Commissioners approved a scheme whereby the dispensary was to be maintained, house B. was to be turned into a home for nurses, a very small proportion of whom were to give their services gratuitously, and the bulk of the fund was to be applied in enlarging and maintaining a general hospital, called the Bolingbroke Hospital, outside and half a mile from the boundary of the parish of Streatham. This hospital was to be renamed the Weir and Bolingbroke Hospital, and a certain number of beds were to be appropriated so as to give a preference to inhabitants of Streatham:—

Held by the Court of Appeal (reversing the decision of Eve J., [1910] W. N. 82), that the scheme was ultra vires, and the order of the Commissioners must be discharged and the matter remitted to the Commissioners for reconsideration.

In re Campden Charities, (1881) 18 Ch. D. 310, explained. *In re* WEIR HOSPITAL – **C. A. 124**

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COMPANY—*Debenture-holders' Action—Receiver and Manager — Bond — Sureties — Default—Rights of Trade Creditors.*

A receiver and manager in a debenture-holders' action gave the usual security by a bond with sureties.

He properly incurred and was entitled to be indemnified by the estate against trade liabilities to the extent of 900*l.* for goods supplied to him on credit, of which the estate had the benefit, but his cash account was deficient by 400*l.* which he was unable to pay :—

Held, that the trade creditors could only claim against the estate to the net amount of the receiver's indemnity, i.e., 500*l.*, and they and not the sureties must bear the loss of the 400*l.*

In re Johnson, (1880) 15 Ch. D. 548, 555, applied.

In re BRITISH POWER TRACTION AND LIGHTING COMPANY. HALIFAX JOINT STOCK BANKING COMPANY *v.* BRITISH POWER TRACTION AND LIGHTING COMPANY – **Swinfen Eady J. 470**

2. —— *Debentures—Future Property—Floating Charge—Trust Deed—Restriction against Creation of Prior Mortgages—Purchase by Company—Purchase-money to remain on Mortgage—Vendor's Lien — Legal Mortgage — Priority — Registration of Debentures—Companies Act*, 1900 (63 *&* 64 *Vict. c.* 48), *s.* 14—*Constructive Notice —Extent—Second Mortgage—Notice—Power of Company—Postponement.*

On the sale of freehold property to a company in 1904, the vendors agreed to let part of the purchase-money remain on mortgage. The conveyances to the company were executed, but remained in the custody of the vendors' solicitor, and subsequently, on January 27, 1905, the mortgage deed was executed without investigation or inquiry on the part of the vendors as to the company's title and without notice of any debentures or trust deed. In 1901 the company had issued debentures secured by a trust deed, particulars whereof had been duly registered pursuant to s. 14 of the Companies Act, 1900. Both the trust deed and the debenture charged the undertaking of the company and all its present and future property by way of a floating charge in the usual manner, and both prohibited the creation of any charge on such property ranking in priority to or pari passu with the security created in favour of the debentures, but the conditions indorsed on the debenture, a form of which was scheduled to the trust deed, provided that nothing "herein" contained should prevent the creation of specific mortgages upon after-acquired freehold or leasehold property.

On June 7, 1906, the plaintiff, with notice of the debentures and trust deed, took a mortgage from the company upon the same premises but subject to the mortgage of January 27, 1905, which was afterwards transferred to him. In a foreclosure action :—

Held, as to the mortgage of January 27, 1905, that, whether the vendors had or had not notice of the trust deed and debentures, any equity that attached to the purchased property in favour of the debenture-holders or trustees was subject to the paramount equity of the unpaid vendors, and that the mortgage took priority over any charge to persons claiming through the company.

If the priority had turned upon the question of notice, the particulars registered pursuant to s. 14 of the Companies Act, 1900, would have amounted to constructive notice of a charge affecting the property but not of any special restrictions upon dealings by the company with its property in the usual manner when the subsisting charge is a floating security.

Held, as to the mortgage of June 7, 1906, that the security created by the trust deed and the debenture was cumulative ; that the former was not controlled by the proviso in the conditions indorsed on the debenture ; and that the company had no power to create this mortgage in priority to the trust deed.

WILSON *v.* KELLAND – – **Eve J. 306**

3. —— *Director — Contract of Service — Restraint of Trade—Breach of Negative Covenant—Interdependent Contracts—Specific Performance —Winding-up—Injunction.*

The defendant, in July, 1903, entered into an agreement with the plaintiff company (of which he was a director) (1.) to hold office for seven years at a fixed salary, and (5.) covenanted that so long as he should continue to hold office, and for seven years after ceasing to hold such office, he would not, either solely or jointly with, or as manager or agent for, any other person or persons or company directly or indirectly carry on or be engaged or interested in any business that would compete with that carried on by the company. In April, 1909, a receiver and manager was appointed in a debenture-holder's action, and a compulsory winding-up order was made against the company. The receiver and manager having given notice to the defendant that his services would no longer be required, and having ceased to pay his salary, the defendant commenced to carry on business on his own account. In an action to restrain the defendant from carrying on business in competition with the company in breach of his covenant :—

Held (Buckley L.J. dissenting), that the plaintiff company could not have specific performance [of clause 5 without performing, and they could not now perform, clause 1 in favour of the defendant, and consequently that he was no longer bound by his restrictive covenant and that the company were not entitled to an injunction.

Decision of Joyce J., [1910] 1 Ch. 336, affirmed.

Held by Buckley L.J., that clauses 1 and 5

were not interdependent contracts, that in the events which had happened clause 5 still remained binding on the defendant, and that the plaintiff company were entitled to an injunction. MEASURES BROTHERS, LIMITED *v.* MEASURES **C. A. 248**

4. —— *Memorandum and Articles of Association—Alteration by Special Resolution—Increase of Capital—Resolution of Directors—Validity—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 12; *Sched. I., Table A, arts.* 26, 55, 68.

The articles of association of a limited company incorporated in 1893 provided by article 53 that "the company in general meeting" might increase its capital by the creation of new shares. By a special resolution, passed and confirmed at extraordinary general meetings of the company in 1895, article 53 was modified so that the power of increasing the capital should no longer be exercised by the company in general meeting but by "resolution of the directors." In 1903 the directors passed a resolution increasing the capital of the company. By s. 12 of the Companies Act, 1862, it was provided that "any company" limited by shares might so far modify the conditions of its memorandum as to increase its capital by the issue of new shares. In an action by a shareholder seeking to have the resolutions declared ultra vires:—

Held that, reading the Act of 1862 and the schedule together, the Legislature conferred upon the company powers which it was not necessary that the company should exercise in general meeting, and s. 12 of the Act of 1862 contained one of such powers.

Held, also, that the provision of further capital for the carrying on of a trading concern was a power exercisable in the management of the company's business within the meaning of art. 55 of Table A in the schedule to the Act of 1862.

Held, therefore, that the company was acting within its powers in modifying its articles so as to give the board of directors power to increase the capital, and the action must be dismissed.

Campbell's Case, (1873) L. R. 9 Ch. 1, 22, followed. MOSELY *v.* KOFFYFONTEIN MINES, LIMITED – – – – – **Eve J. 382**

5. —— *Reduction of Capital—Publication of Reasons — Companies (Consolidation) Act*, 1908 (8 *Edw.* 7, *c.* 69), *s.* 55.

Owing to the recent fall in the value of licensed properties a brewery company that had always had a credit balance to profit and loss and paid dividends found itself compelled to reduce its capital by a very large amouut.

In sanctioning the reduction the Court ordered the company to publish a short memorandum of the reasons for the reduction and the causes which led to it for the information of the public under s. 55 of the Companies (Consolidation) Act, 1908.

In re TRUMAN, HANBURY, BUXTON & Co., LIMITED – – – **Swinfen Eady J. 498**

6. —— *Return of Capital to be called up again—Some Shares fully paid—Return on fully-paid Shares only—Companies (Consolidation) Act*, 1908 (8 *Edw.* 7, *c.* 69), *s.* 40, *sub-s.* 1.

The defendant company had an issued capital of 40,000 preference shares of 5*l.* each fully paid and 60,000 ordinary shares of 5*l.* each, of which 6047 were fully paid and the residue were only paid to the extent of 1*l.* a share. By the articles of association dividends were paid in proportion to the amount paid up on the shares. The company had paid dividends of 10 per cent. on the amounts paid up on the ordinary shares and had accumulated a very large reserve fund consisting of undivided profits. A special resolution was duly passed and confirmed "That out of the accumulated profits of the company the sum of 4*l.* per share be paid to the holders of 6047 fully-paid ordinary shares of the company by way of reduction of capital pursuant to section 40 of the Companies (Consolidation) Act, 1908":—

Held, that that section could not be construed as only authorizing the return of capital to the whole class of shareholders among whom the accumulated profits were divisible, and therefore the resolution was not ultra vires.

NEALE *v.* CITY OF BIRMINGHAM TRAMWAYS COMPANY – **Swinfen Eady J. 464**

7. —— *Scheme of Arrangement—Winding-up—Meetings of Members—Separate Classes—Fully-paid Shares—Shares partly paid with uncalled Balance paid in Advance of Calls—Companies (Consolidation) Act*, 1908 (8 *Edw.* 7, *c.* 69), *s.* 120.

For the purpose of class meetings of members summoned in a winding-up to approve a scheme of arrangement under s. 120 of the Companies (Consolidation) Act, 1908, holders of shares partly paid with the uncalled balance paid in advance of calls and carrying interest are a different class to holders of fully-paid shares.

In re Exchange Drapery Co., (1888) 38 Ch. D. 171, 175, and *In re Wakefield Rolling Stock Co.*, [1892] 3 Ch. 165, 174, applied. *In re* UNITED PROVIDENT ASSURANCE COMPANY **Swinfen Eady J. 477**

8. —— *Winding-up — Debenture — Floating Charge within Three Months of Winding-up — Cash paid at the Time of Creation of Charge—Registration — Companies (Consolidation) Act*, 1908 (8 *Edw.* 7, *c.* 69), *ss.* 93, 212.

Where a floating charge is created on the property of a company within three months of the commencement of the winding up of the company the question whether cash is paid "at the time of the creation of the charge" within s. 212 of the Companies (Consolidation) Act, 1908, is a question of fact to be determined by all the circumstances of the case, and as a general rule a payment on account made in consideration for the charge, although made a few days before the execution of the debenture, is made at the time of its creation.

A company being in need of funds, the directors on November 25, 1909, accepted an offer by S. to advance 1000*l.* upon the security of a floating charge on the property of the company and passed a resolution that a debenture should be prepared to be executed at the next meeting of the board. On the strength of this resolution

COMPANY—*continued.*

S. paid to the company, on account of the 1000*l.*, 350*l.* immediately and a further 350*l.* on December 2. At the next meeting on December 6 the debenture was duly executed and the balance of the 1000*l.* was paid. The debenture was registered on December 23. The company went into liquidation in the following January, and the liquidator disputed the validity of the charge :—

Held, (1.) that for the purposes of s. 93 of the Companies (Consolidation) Act, 1908, the charge was created at the time when the formal instrument was executed, and that therefore it was registered within twenty-one days of its creation ; (2.) that the whole of the 1000*l.* was advanced "at the time" of the creation of the charge within s. 212 ; consequently that the debenture was a valid security for the full amount.

Decision of Neville J., [1910] 1 Ch. 758, affirmed.

In re COLUMBIAN FIREPROOFING COMPANY, LIMITED – – – – – **C. A. 120**

9. —— *Winding-up—Fraudulent Preference —Voluntary followed by Compulsory Winding-up —Date of Act of Bankruptcy—Companies Act*, 1862 (25 *&* 26 *Vict. c.* 89), *s.* 164—*Companies (Consolidation) Act*, 1908 (8 *Edw.* 7, *c.* 69), *s.* 210.

When a voluntary winding-up is followed by a compulsory winding-up, then, for the purpose of the fraudulent preference section (Companies Act, 1862, s. 164 ; Companies (Consolidation) Act, 1908, s. 210), the act of bankruptcy is the presentation of the petition.

In re Taurine Co., (1883) 25 Ch. D. 118, 138, applied.

In re RUSSELL HUNTING RECORD COMPANY, LIMITED – – **Swinfen Eady J. 78**

10. —— *Winding-up—Reconstruction—Dissentient Shareholder — Registered Office in Rhodesia—Notice of Dissent left at London Office — Waiver by Liquidator — Conflict of Law — Companies Act*, 1862 (25 *&* 26 *Vict. c.* 89), *s.* 161 —*Companies (Consolidation) Act*, 1908 (8 *Edw.* 7, *c.* 69), *s.* 192, *sub-s.* 3—*Evidence of Local Law.*

The plaintiff was the holder of fully paid up shares in the defendant company, which was in course of liquidation for the purposes of reconstruction. The company was registered in 1903 under the Companies Ordinance, 1895, of Southern Rhodesia, and its registered office was in Bulawayo. By the company's articles it was provided that the business of the company should be carried on in England. At extraordinary general meetings held in London on June 18 and July 3, 1909, resolutions had been passed for the voluntary winding up of the company, and all its assets were to be taken over by a new company.

Under s. 158 of the Companies Ordinance, 1895, which was similiar to s. 161 of the Companies Act, 1862, a dissentient shareholder had to give notice of dissent at the registered office of the company within seven days of the date of the meeting. The plaintiff voted against the resolutions and on July 5 gave notice of dissent at the London office of the company. On July 6 the liquidator sent him in reply a letter in the following terms :—"I am in receipt of your

COMPANY—*continued.*

letter of the 5th inst. and note that you do not consent to the reconstruction of the above company." Subsequently the liquidator refused to treat the notice of dissent as valid on the ground that it was not served at the registered office of the company, and the plaintiff brought this action. Under the Companies Ordinance, 1895, the liquidator had power to do all acts in the name and on behalf of the company :—

Held, that the liquidator had waived the irregularity and that the notice of dissent must be treated as valid.

Evidence of an expert in Roman-Dutch law admitted although he had not practised in Rhodesia.

BRAILEY *v.* RHODESIA CONSOLIDATED, LIMITED – – – **Warrington J. 95**

—— Agent, Limited company appointed—Commission and salaries—Articles of association—Accounts – – – **408**
See PRINCIPAL AND AGENT.

—— Debentures, Contract to issue—Floating charge on foreign land—Clog on equity of redemption – – – – **502**
See CONFLICT OF LAWS. 1.

—— Electric lighting.
See under ELECTRIC LIGHT.

—— Friendly society—Conversion into company—Enlargement of objects—Ultra vires—Registration of company – **169**
See FRIENDLY SOCIETY.

—— Lease—Contract not to assign without consent—Assignment to limited company—Forfeiture – – – **525**
See LANDLORD AND TENANT. 1.

—— One man company—Unqualified person managing director—Managing director described as "specialist"—Misrepresentation – – – – – **401**
See VETERINARY SURGEON.

CONDITION—Marriage, Condition as to consent to—Marriage with consent in testator's lifetime—Codicil confirming will after the marriage – – – – **322**
See WILL. 2.

CONFLICT OF LAWS—*Contract—Proper Law—Immovables — Contract to issue Debentures — Floating Charge on Foreign Land—Clog on Equity of Redemption.*

An English contract to give a mortgage on foreign land, although the mortgage has to be perfected according to the lex situs, is a contract to give a mortgage which, inter partes, is to be treated as an English mortgage subject to such rights of redemption and other equities as the law of England regards as necessarily incident to a mortgage.

The equitable rule against clogging the equity of redemption of a mortgage applies to an English contract for an issue of debentures to secure a loan, and will be enforced against a contracting party in the jurisdiction although

CONFLICT OF LAWS—*continued.*

the floating security to be created by the debentures comprises foreign land where the clog doctrine is possibly not recognized.

Decision of Swinfen Eady J., [1910] 1 Ch. 354, affirmed. BRITISH SOUTH AFRICA COMPANY *v.* DE BEERS CONSOLIDATED MINES, LIMITED – – – – – **C. A. 502**

2. —— *Mortmain — Testator domiciled in England—Residuary Bequest to Charity—Colonial Mortgages—Applicability of Colonial Mortmain Law—Movables or Immovables—English Law, including Mortmain Act*, 1736 (9 *Geo.* 2, *c.* 36), *adopted in Colony.*

English law would treat English land mortgages as immovables, so that a bequest of English mortgages to charity would be governed by the local mortmain law of England, whatever be the domicil of the testator.

The general English law, including the Mortmain Act, 1736, and the decisions thereon as to the invalidity of local bequests of local mortgages or other impure personalty to charity having been adopted locally in Ontario :—

Held, that a bequest of freehold mortgages in Ontario to charity by a testator domiciled in England and dying on February 22, 1888, when the adopted Mortmain Act, 1736, was locally in force in Ontario, being a bequest of an interest in land forbidden by the local law, was invalid.

Freke v. *Lord Carbery*, (1873) L. R. 16 Eq. 461, and *Duncan* v. *Lawson*, (1889) 41 Ch. D. 394, 396, extended.

Canterbury Corporation v. *Wyburn*, [1895] A. C. 89, 96, applied. *In re* HOYLES. ROW *v.* JAGG – – – **Swinfen Eady J. 333**

—— Company—Winding-up—Reconstruction—Dissentient shareholder — Registered office in Rhodesia—Notice of dissent left at London office – – **95**
See COMPANY. 10.

CONSENT—Disentailing assurance—Protector of settlement – – – – **111**
See ESTATE TAIL.

—— Lease—Contract not to assign without consent—Assignment to limited company—Forfeiture – – – **525**
See LANDLORD AND TENANT. 1.

—— Tramways—Consent of Board of Trade **263**
See TRAMWAYS. 1.

—— Will—Condition as to consent to marriage – – – – – **322**
See WILL. 2.

CONSOLIDATED FUND—Payment out of Court—Wrong person—Liability of Consolidated Fund – – – – **481**
See PRACTICE. 2.

CONSOLIDATED LOANS FUND—Power to use, for fresh loans—Local government—Municipal corporation—Ultra vires **560**
See CORPORATION.

CONTRACT—Proper law — Immovables — Contract to issue debentures — Floating charge on foreign land—Clog on equity of redemption – – – – **502**
See CONFLICT OF LAWS. 1.

CONTRACT OF SERVICE—Restraint of trade—Breach of negative covenant—Interdependent contracts—Specific performance – – – – – **248**
See COMPANY. 3.

CONVERSION—Friendly society — Conversion into company—Enlargement of objects—Ultra vires—Registration of company **169**
See FRIENDLY SOCIETY.

CONVEYANCE—Form of—Parcels—Description by reference to plan—Restrictive words—Right of vendor to insert – **60**
See VENDOR AND PURCHASER. 2.

CONVEYANCING AND LAW OF PROPERTY—Will—Administration — Annuities and legacies charged on property — Continuing liability of residue – – **438**
See WILL. 1.

COPYRIGHT—*Infringement — Injunction — List of Brood Mares—Competition—Damage.*

The plaintiffs published in the "General Stud Book," a fresh volume of which appeared every four years, lists of all the thoroughbred brood mares at the stud in Great Britain. These volumes were entered and registered at Stationers' Hall. The defendants compiled a book called "Bruce-Lowe Figures to Stud Book, Vol. 21," which contained, without the plaintiffs' permission, practically the whole of the list of brood mares published in vol. 21 of the Stud Book. The plaintiffs brought an action for an injunction restraining the defendants from infringing their copyright. The defendants alleged that they had a right to make use of the list in question, and that their book would be sure to benefit the plaintiffs by increasing the sale of the Stud Book :—

Held, that the lists were not such bare lists of names as to be incapable of copyright ; that an unfair use might be made of one book in the preparation of another even if there was no likelihood of competition between the former and the latter ; that an action to restrain infringement of copyright would lie though no damage was shewn ; and that the plaintiffs were entitled to succeed in the action. WEATHERBY & SONS *v.* INTERNATIONAL HORSE AGENCY AND EXCHANGE, LIMITED – – **Parker J. 297**

CORPORATION—*Borrowing Powers—Overdraft—Power to borrow for specific Purposes—General Overdraft—Interest—Power to use Consolidated Loans Fund for fresh Loans—Ultra vires—Local Government — Municipal Corporation — Urban Authority.*

The defendant corporation had statutory powers to borrow money with the sanction of the Local Government Board for the purposes of several undertakings which they were authorized to carry on, including the supply of electricity

CORPORATION—*continued.*

and electrical fittings and the construction and working of electric tramways. The corporation in 1905 applied to their bank for and obtained leave to overdraw their general account to the extent of 120,000*l.* for six months. The overdraft was allowed on the security of their unexhausted borrowing powers. At this time they had applied for but not yet obtained the sanction of the Local Government Board to a large loan for the purposes of their electricity undertaking. This sanction was afterwards obtained. The overdraft was renewed from time to time for different amounts. At the commencement of this action the limit stood at 50,000*l.*, and before the hearing the overdraft was paid off altogether. The moneys received from the overdraft were paid into the corporation's general account and applied for the purposes of all their undertakings indiscriminately:—

Held, that this borrowing by way of overdraft was illegal.

The corporation were bound by their private Acts to pay every year into an account called the consolidated loans fund sufficient moneys to provide for the interest and instalments of principal to be repaid in respect of all their loans, which were raised by the issue of stock. But they had power when a fresh loan was authorized to borrow from the consolidated loans fund instead of issuing fresh stock. They applied the whole of the consolidated loans fund in reducing their overdraft in anticipation of the assent of the Local Government Board to fresh loans:—

Held, that this application of the consolidated loans fund was illegal. ATTORNEY-GENERAL *v.* WEST HAM CORPORATION – **Neville J. 560**

—— Electric lighting.
See under ELECTRIC LIGHT.

—— Execution—Enforcing order against corporation — Writ of sequestration — Injunction to restrain sewage nuisance
See SEQUESTRATION. **190**

—— Ultra vires—Purchase by agreement—Special Act—Validity of covenant—Restriction of powers given for benefit of public – – – – – **12**
See VENDOR AND PURCHASER. 1.

COSTS—*Claim and Counter-claim—Claim dismissed with Costs—Counter-claim dismissed with Costs—Form of Judgment—Practice.*

Where the plaintiff's claim and the defendant's counter-claim are both dismissed with costs, the proper form of judgment is to refer it to the taxing Master to tax the defendant's costs of the action and the plaintiff's costs of the counter-claim and to set off the costs of the plaintiff and defendant and to order payment of the balance by the party from whom the same shall be found to be due to the other party.

JAMES *v.* JACKSON – **Warrington J. 92**

—— Infant—Next friend—Unsuccessful action — Costs and damages — Indemnity — Declaration – – – – **393**
See INFANT.

COUNTER-CLAIM—Claim dismissed with costs—Counter-claim dismissed with costs—Form of judgment – – – **92**
See COSTS.

COURT OF CHANCERY (FUNDS) ACT, 1872 – 481
See PRACTICE. 2.

COVENANT—Company—Director—Contract of service—Restraint of trade—Breach of negative covenant – – – **248**
See COMPANY. 3.

—— Corporation—Ultra vires — Covenant not to erect buildings—Validity of covenant – – – – – **12**
See VENDOR AND PURCHASER. 1.

—— Market, Substructure and support of—Lease — Covenant — Iron girders — Deterioration — Standard of strength
See LANDLORD AND TENANT. 2. **314**

CYPRÈS—Charity—Scheme by Charity Commissioners—Jurisdiction—Intention of testator—Possibility of carrying out
See CHARITY. **124**

DAMAGE AND DAMAGES — Copyright — Infringement—Injunction—List of brood mares—Competition – – – **297**
See COPYRIGHT.

—— Infant—Next friend—Unsuccessful action — Costs and damages — Indemnity — Declaration – – – – **393**
See INFANT.

DEBENTURE—Company.
See under COMPANY.

DEED—*Assignment for Value—Defective Title—Subsequent Acquisition of Good Title—Equitable Estoppel.*

If an assignor with a defective title purports and intends to assign property for value, any interest subsequently acquired by him in that property is available in equity to make the assignment effectual, even though the defect in title is apparent on the face of the assignment.

Noel v. *Bewley*, (1829) 3 Sim. 103, 116, and *In re Hoffe's Estate Act*, 1855, [1900] W. N. 114; 82 L. T. 556, followed and applied.

In re BRIDGWATER'S SETTLEMENT. PARTRIDGE *v.* WARD – **Swinfen Eady J. 342**

DELAY—Hospital — Judgment for arrears of management expenses—Excusable delay—Mandamus to levy retrospective rate
See LOCAL GOVERNMENT. 2. **347**

DEPOSIT — Tramway company — Statutory undertaking—Parliamentary deposit—Non-completion — Abandonment — Application of deposit fund – **1**
See TRAMWAYS. 2.

DESIGN — *Registration — Infringement — "New or original" — Patents and Designs Act*, 1907 (7 *Edw.* 7, *c.* 29), *ss.* 49, 50, 93.

Sect. 49 of the Patents and Designs Act, 1907, provides for the registration of "any new or original design not previously published in the United Kingdom"; and the Act gives protection to a design so registered. The word "original" in that section contemplates that the designer has by the exercise of intellectual activity conceived an idea, which has not previously occurred to any one else, of applying a particular pattern or shape or ornament to the particular article to which he suggests that it shall be applied. If that state of things be satisfied, then the design may be "original" although the actual pattern or shape or ornament under consideration be old in the sense that it has existed previously with reference to another article.

The plaintiffs were the owners of a registered design in class 3 for a pattern or ornament of hand grip for cycle handles. The design consisted of an engine-turned pattern in wavy lines applied to the hand grip, and broken up into panels by deep longitudinal grooves, the hand grip terminating in a ring separating the panels from the smooth end of the cylindrical handle bar. The engine turning was of a common pattern and none of the other details of the design were new. In an action for infringement Warrington J. held that the design was "new or original" having regard to the kind of article for which it was registered :—

Held, on appeal, that there was no novelty or originality in applying to a cycle handle a form of decoration which, as was proved, was in common use upon other articles of a cylindrical shape.

Decision of Warrington J. reversed. DOVER, LIMITED *v.* NÜRNBERGER CELLULOIDWAREN FABRIK GEBRÜDER WOLFF – – **C. A. 25**

DIRECTOR—Company.
See under COMPANY.

DISCLAIMER — Patent — Infringement — Invalidity—Amendment of specification—Terms – – – – – **373**
See PATENT. 1.

DISENTAILING ASSURANCE — Protector of settlement—Consent where himself the disentailing tenant in tail – – **111**
See ESTATE TAIL.

DISENTAILING DEED — Tenant in tail in possession—Right to accumulations **538**
See ACCUMULATIONS. 1.

DIVIDENDS—Ownership of—Mortgage of house and dividends in one mortgage—Foreclosure — Disclaimer by mortgagee of all interest in house — Liability for repair of house – – – – **230**
See WILL. 3.

DOMICIL — Mortmain — Testator domiciled in England—Residuary bequest to charity — Colonial mortgages — Applicability of Colonial mortmain law – – **333**
See CONFLICT OF LAWS. 2.

DONATIO MORTIS CAUSA—*Subsequent Will — Revocation—Legacy of equal Amount—Satisfaction.*

Where a donor has made a donatio mortis causa, the mere fact that he subsequently makes a will by which he gives to the donee a legacy of equal amount does not raise the presumption that the legacy was intended as a satisfaction of the donation.

Testator gave to the plaintiff, who was his housekeeper, certain deposit notes for sums representing in the aggregate 2000*l.* under such circumstances as to constitute a valid donatio mortis causa of the sums thereby represented. Two days later he made a will by which he gave her a legacy of 2000*l.* :—

Held, that the will was not a revocation of the donation, and that, there being no circumstances from which the Court could infer that the testator intended that the legacy should be a satisfaction of the donation, the plaintiff was entitled both to the donation and the legacy.

Jones v. *Selby*, (1710) Prec. Ch. 300, considered. HUDSON *v.* SPENCER
Warrington J. 285

DUTY—Inland Revenue.
See under REVENUE.

ELECTRIC LIGHT — *Connecting two Areas of Supply of one Company by Mains—Right to break up Streets and lay Mains outside Company's Areas — Electric Lighting Act*, 1882 (45 *&* 46 *Vict. c.* 56), *ss.* 12, 13—*Electric Lighting (Clauses) Act*, 1899 (62 *&* 63 *Vict. c.* 19), *Schedule*, *s.* 12—*London Electric Supply Act*, 1908 (8 *Edw.* 7, *c. clxvii.*), *s.* 4.

The defendant company was a company to which the London Electric Supply Act, 1908, applied. The company had one area of supply north of and another south of the Thames, and wished to connect the same by mains running through streets outside either area, including London Bridge, a bridge belonging to the Corporation of the City of London as trustees of the Bridge House Estates, and repairable by the Corporation as such trustees and not by any local authority :—

Held, that s. 4, sub-s. 3 (B), of the Act of 1908 gave power to the company to break up the intervening streets and bridge for the purpose of laying therein the connecting mains, subject to the consent either of the Corporation or of the Board of Trade under s. 13 of the Electric Lighting Act, 1882, and s. 12, sub-s. 2, of the schedule to the Electric Lighting (Clauses) Act, 1899.

Sect. 4 of the Act of 1908 explained. LONDON CORPORATION *v.* COUNTY OF LONDON ELECTRIC SUPPLY COMPANY **Parker J. 208**

2. —— *Electric Lighting — Municipal Corporation—Statutory Powers—"Supply" of Electricity — "Things necessary and incidental to such supply"—Supplying Lamps and Fittings—Trading — Ultra vires — Injunction — Electric Lighting Act*, 1882 (45 *&* 46 *Vict. c.* 56), *ss.* 2, 4, 6, 10, 12, 18, 24, 25, 32—*Electric Lighting Act*, 1909 (9 *Edw.* 7, *c.* 34), *ss.* 6, 16—*Gasworks Clauses Act*, 1847 (10 *&* 11 *Vict. c.* 15), *ss.* 6—12,

ELECTRIC LIGHT—*continued.*

13, 14, 18—20—*Gasworks Clauses Act*, 1871 (34 & 35 *Vict. c.* 41), *ss.* 38—41, 45, 46.

The Electric Lighting Act, 1882, s. 10, provides that undertakers authorized to supply electricity may "enter into such contracts and generally do all such acts and things as may be necessary and incidental to such supply."

A municipal corporation under the provisions of the Act of 1882 and a provisional order of the Board of Trade were the undertakers for the supply of electricity within their area, and purporting to exercise their statutory powers supplied every description of electrical fittings and apparatus to consumers of electricity:—

Held, that the statutory powers of the undertakers ceased with the delivery of electrical energy at the terminals, i.e., the meter, on the consumer's premises and was complete at that point, and that the general power to do "all such acts and things as were necessary and incidental to such supply" was limited to the generation and delivery of such supply.

Held, also, that the analogy of the supply of gas under the Gasworks Clauses Acts, 1847 and 1871, did not apply to the supply of electricity under the Electric Lighting Acts.

Held, therefore, that the supply of electrical fittings and apparatus for the use of consumers was ultra vires the corporation, and an injunction was granted accordingly.

ATTORNEY-GENERAL *v.* LEICESTER CORPORATION – – – – **Neville J. 359**

EQUITABLE ESTOPPEL.
See under ESTOPPEL.

EQUITY OF REDEMPTION—Clog on—Floating charge on foreign land – – **502**
See CONFLICT OF LAWS. 1.

ESTATE DUTY.
See under REVENUE.

ESTATE TAIL—*Disentailing Assurance—Protector of Settlement—Consent where himself the Disentailing Tenant in Tail—Fines and Recoveries Act*, 1833 (3 & 4 *Will.* 4, *c.* 74), *ss.* 34, 42.

By the will of a testatrix who died in 1880 realty was devised in trust (in the events which happened) for M. for life, with remainder in trust for his first and other sons successively in tail male, with remainder in trust for M. in tail, with certain remainders over in trust for other persons. M. was advised in 1902 that the son's estates in tail male were void for remoteness and that he was entitled as tenant in tail male or tenant in tail in possession, and by a disentailing deed executed by him shortly afterwards, after reciting the will, the advice given to him, and that he was desirous of barring his estate in tail male and all other his estates in tail and all other estates, interests, and powers to take effect after the determination or in defeasance thereof, he conveyed the real estate to a grantee to the use of himself in fee simple, discharged from all his estates in tail male or in tail and all estates, rights, interests, and powers to take effect after the determination or in defeasance of such estates in tail male or in tail. The deed contained no

ESTATE TAIL—*continued.*

separate consent by M. as protector of the settlement.

In 1903 it was decided that the estates in tail male of the sons of M. were not void, and that he took in the first place only an estate for life: *In re Wilmer's Trusts, Moore* v. *Wingfield*, [1903] 2 Ch. 411. M. died in 1909 without issue:—

Held, that the execution of the disentailing assurance by M. operated as a consent by him as protector of the settlement, that the estates in remainder on his own estate in tail were barred, and that he took the property in fee simple subject to his own life estate.

In re WILMER'S TRUSTS. WINGFIELD *v.* MOORE – – – – **Parker J. 111**

ESTOPPEL — Deed — Assignment for value — Defective title—Subsequent acquisition of good title—Equitable estoppel **342**
See DEED.

EVIDENCE—Rhodesia—Evidence of local law
See COMPANY. 10. **95**

EXECUTION—Enforcing order against corporation—Practice—Writ of sequestration—Injunction to restrain sewage nuisance
See SEQUESTRATION. **190**

—— Power to appoint up to a limited amount—General power—Charge – – **216**
See POWER OF APPOINTMENT. 1.

FINANCE ACT, 1894—Will made before—Probate duty — Direction to pay out of specific fund – – – – **69**
See WILL. 5.

FINES AND RECOVERIES ACT—Disentailing assurance — Protector of settlement — Consent where himself the disentailing tenant in tail – – – – **111**
See ESTATE TAIL.

FLOATING CHARGE — Company—Winding-up—Debenture — Floating charge within three months of winding-up—Registration – – – – – – **120**
See COMPANY. 8.

—— On foreign land—Floating charge—Debentures, Contract to issue—Clog on equity of redemption – – – – **502**
See CONFLICT OF LAWS. 1.

FORECLOSURE—Mortgage.
See under MORTGAGE.

FOREIGN LAND—Floating charge on—Contract to issue debentures—Clog on equity of redemption – – – – **502**
See CONFLICT OF LAWS. 1.

FORFEITURE—Lease—Covenant not to assign without consent—Assignment to limited company – – – – – **525**
See LANDLORD AND TENANT. 1.

FRAUDULENT PREFERENCE — Company — Voluntary followed by compulsory winding-up—Date of act of bankruptcy **78**
See COMPANY. 9.

FRIENDLY SOCIETY—*Conversion into Company—Enlargement of Objects—Ultra vires—Registration of Company—Certificate of Incorporation—Conclusiveness—Injunction—Form of Action—Representative Action by Member of Company—Friendly Societies Act*, 1896 (59 & 60 *Vict. c.* 25), *ss.* 8, 71—*Companies (Consolidation) Act*, 1908 (8 *Edw.* 7, *c.* 69), *s.* 17, *sub-s.* 1.

Where a registered friendly society, in avowed exercise of the powers of s. 71 of the Friendly Societies Act, 1896, passed a special resolution to convert itself into a company under the Companies Acts, with a memorandum of association annexed thereto, and obtained registration of itself as a company, and a member of the company, who had been a member of the friendly society, suing on behalf of himself and all other the members of the company, moved for an injunction to restrain the company from exercising any of the powers enumerated in the memorandum of association in excess of those allowed by the Friendly Societies Act, 1896 :—

Held by Eve J. and the Court of Appeal, that the action was misconceived, and that the motion ought to be refused.

Per Cozens-Hardy M.R. and Buckley L.J. : Whether, notwithstanding the certificate of incorporation, the validity of the special resolution and of the registration could have been successfully impeached by a member of the old friendly society in a properly constituted action, *quære*. MCGLADE *v.* ROYAL LONDON MUTUAL INSURANCE SOCIETY, LIMITED – **C. A. 169**

GAS—"Supply" of electricity—Electric lighting—Municipal corporation—Statutory powers – – – – – **359**
See ELECTRIC LIGHT. 2.

GRAMOPHONE—Trade mark—Word directly referring to character of goods—Distinctive word – – – – **423**
See TRADE MARK. 3.

HOSPITAL—Agreement by local authorities for joint use of hospital — Management expenses apportioned—Notice by one local authority to determine agreement —Validity of notice – – – **347**
See LOCAL GOVERNMENT. 2.

INDEMNITY — Infant — Next friend — Unsuccessful action—Costs and damages
See INFANT. **393**

INFANT—*Next Friend—Unsuccessful Action—Cost and Damages—Indemnity—Declaration.*

Where an action, properly instituted under the advice of counsel, and conducted with diligence and propriety by a next friend in the interest of an infant, has been dismissed with costs and damages to be paid by the next friend, the infant will be held bound to indemnify the

INFANT—*continued.*

next friend against such costs and damages, and the costs, charges, and expenses properly incurred by him on the infant's behalf in relation to such action ; but no declaration of charge in respect of such costs will be made upon the infant's property where such property is not being administered by the Court. STEEDEN *v.* WALDEN – – **Eve J. 393**

INFRINGEMENT—Copyright.
See under COPYRIGHT.

—— Design.
See under DESIGN.

—— Patent.
See under PATENT.

INHERITANCE, WORDS OF—Absence of **181**
See POWER OF APPOINTMENT. 2.

INJUNCTION—Company— Director — Contract of service—Restraint of trade—Breach of negative covenant—Interdependent contracts – – – – **248**
See COMPANY. 3.

—— Copyright—Infringement—List of brood mares—Competition—Damage – **297**
See COPYRIGHT.

—— Electric lighting.
See under ELECTRIC LIGHT.

—— Liverpool Sanitary Amendment Act, 1864 —Demolition of buildings—"Court"—Public Authorities Protection Act, 1893
See LOCAL GOVERNMENT. 1. **449**

—— Patent.
See under PATENT.

—— Sewage nuisance—Practice—Execution—Enforcing order against corporation—Writ of sequestration – – **190**
See SEQUESTRATION.

—— Street widening—Notice to treat for "part of" a factory—Invalid notice – **105**
See LONDON.

—— Veterinary surgeon.
See under VETERINARY SURGEON.

INSURANCE (LIFE)—*Life Policy—Mortgages—Priorities—Notice.*

Where a person lends money on the security of a policy of life assurance which is not handed over to him, he has, if it is in the hands of a prior mortgagee, constructive notice of the prior mortgage, and cannot obtain priority by giving notice to the assurers before the prior mortgagee gives notice.

Spencer v. *Clarke*, (1878) 9 Ch. D. 137, followed.

A mortgagee of a life policy is not under any obligation to give notice of his mortgage to a prior mortgagee of whose security he has notice, and if the latter makes further advances to the mortgagor in pursuance of a fresh bargain and a further charge, the security in respect of the

INSURANCE (LIFE)—*continued.*

further advances has not priority over that of the subsequent mortgagee if he gives prior notice to the assurers.

Quære whether the prior mortgagee would have priority in respect of his further advances if they were made, without notice of a subsequent mortgagee's security, under a contract for security for a present advance and further sums to be advanced. *In re* WENIGER'S POLICY
Parker J. 291

IRON GIRDERS—Deterioration—Standard of strength—Lease—Covenant—Substructure and supports of market – 314
See LANDLORD AND TENANT. 2.

JUDGMENT — Form of — Costs — Claim and counter-claim – – – – 92
See COSTS.

JURISDICTION—Charity—Cyprès—Scheme by Charity Commissioners—Intention of testator — Possibility of carrying out – – – – – – 124
See CHARITY.

JUSTICES — Liverpool Sanitary Amendment Act, 1864—Demolition of buildings—Injunction—Proceedings before justices
See LOCAL GOVERNMENT. 1. 449

LANDLORD AND TENANT—*Lease—Contract not to assign without Consent—Consent not to be withheld from "a respectable and responsible person"—Assignment to Limited Company—Forfeiture.*

A lessee covenanted to use the demised premises for the business of a jobmaster and livery stable keeper, and not to assign or underlet or part with the possession of the premises without the written consent of the lessor, which was not to be withheld in respect of "a respectable and responsible person"—

Held, that the word "person" in the covenant included a corporation, such as a limited company, and that a limited company was capable of being "a respectable and responsible person" within the meaning of the covenant.

Decision of Neville J., [1910] 1 Ch. 754, reversed.

In re Jeffcock's Trusts, (1882) 51 L. J. (Ch.) 507, followed.

Harrison, Ainslie & Co. v. *Barrow-in-Furness Corporation*, (1891) 63 L. T. 834, unless distinguishable on other grounds, overruled. WILLMOTT *v.* LONDON ROAD CAR COMPANY, LIMITED – – – – – C. A. 525

2. —— *Lease—Substructure and Supports of Market—Covenant to well and sufficiently maintain and keep in repair—Construction—Iron Girders—Deterioration—Measure of Liability—Standard of Strength.*

A lease by the Mayor and Corporation of London to a railway company of portions of the substructure and supports of Smithfield Meat Market for the purposes of a station for a term of 100 years from August 1, 1878, perpetually renewable, contained a covenant that the lessees would, during the term, "well and sufficiently maintain, uphold, support, and keep in good, substantial, and tenantable repair" all the demised premises, including the walls, piers, pillars, supports, and roof forming part of the same. The substructure had been excavated and the supports for the roof constructed upon a standard of efficiency to the satisfaction of referees appointed on behalf of the lessors and lessees, in pursuance of an agreement of 1862. There was evidence that some of the iron girders supporting the roof and superstructure had become corroded and weakened, and in 1907 notice to repair according to the covenant was given to the lessees:—

Held that, upon the true construction of the lease, the lessors were entitled to require the lessees to maintain the demised premises at a standard of strength and stability corresponding with that originally fixed, and not merely in such a condition as would secure the absolute safety of the superstructure.

In re LONDON CORPORATION. LONDON CORPORATION *v.* GREAT WESTERN AND METROPOLITAN RAILWAYS – Eve J. 314

LEASE—Landlord and tenant.
See under LANDLORD AND TENANT.

—— Tramway—Statutory powers—Ultra vires—Agreement for lease to adjacent owner—Licence to work – – 263
See TRAMWAYS. 1.

—— Trustee—Power to grant mining leases—Unopened mines – – – 329
See TRUSTEE.

LEASEHOLD HOUSE—Gift of, the legatee performing the conditions of the lease—Mortgage—Foreclosure—Disclaimer by mortgagee of all interest in house—Liability for repairs – – – 230
See WILL. 3.

LEASEHOLDS—Accumulations—Reserve fund to meet liabilities under leases—Validity – – – – – 553
See ACCUMULATIONS. 2.

LEGACY—Will—Construction.
See under WILL.

LIFE INSURANCE.
See under INSURANCE (LIFE).

LIGHT—Electric light.
See under ELECTRIC LIGHT.

LIVERPOOL—Special Act—Liverpool Sanitary Amendment Act, 1864—Demolition of buildings—"Court" – – – 449
See LOCAL GOVERNMENT. 1.

LOCAL GOVERNMENT — *Buildings — Special Act—Liverpool Sanitary Amendment Act*, 1864 (27 & 28 *Vict. c. lxxiii.*)—*Public Health*—

LOCAL GOVERNMENT—*continued.*

Demolition of Buildings — "Court" — Public Authorities Protection Act, 1893 (56 & 57 *Vict. c.* 61), *s.* 1 (*a*)—*Jurisdiction—Injunction—Proceedings before Justices.*

The plaintiff was the owner of No. 6 Court, Great Homer Street, Liverpool, containing on one side six houses with odd numbers and on the other side six houses with even numbers. In 1904 the grand jury presented by presentment "A" that No. 6 Court, and by presentment "B" that the six houses with odd numbers, were unfit for human habitation and ought to be demolished. Copies of the presentments were served on the plaintiff together with notices referring to s. 23 of the Liverpool Sanitary Amendment Act, 1864, which provided that the owner should within three months take down the premises, and that in default the corporation should take them down and in either case should pay compensation. The plaintiff elected to retain the site of the court and of the odd numbered houses, and compensation was paid to her in respect of the six houses, which were subsequently demolished. In March, 1909, notices were served on the plaintiff under ss. 32 to 34 (which make no provision for compensation) of the Housing of the Working Classes Act, 1890, in respect of the six houses with even numbers, and summonses for closing orders in respect of each house were issued. The plaintiff then commenced this action for (1.) a mandamus commanding the defendants to take down No. 6 Court pursuant to the provisions of the Act of 1864, and to have compensation assessed, on the ground that presentment "A" extended to the whole court and all the houses therein, and that the defendants had been guilty of statutory neglect in not taking down all the houses, and (2.) an injunction to restrain the defendants from proceeding with the applications for closing orders before the magistrates on the ground that the demolition was really part of a scheme for reconstruction or ventilation projected by the defendants which ought to be dealt with under the parts of the Act of 1890 entitling the plaintiff to compensation, and not under ss. 32 to 34 :—

Held, that under the Act of 1864 the word "court" meant the passage or place on to which the houses opened, and did not extend to include also the houses themselves, and that the plaintiff's claim to a mandamus failed.

Even if the plaintiff's interpretation of the word "court" had been correct, s. 1 (*a*) of the Public Authorities Protection Act, 1893, would have been a complete answer to her claim, inasmuch as she had elected to accept the status quo in preference to enforcing her statutory rights.

Held, also, that there were no special circumstances to warrant interference with the proceedings before the magistrates, and that the claim for an injunction must be refused.

Grand Junction Waterworks Co. v. *Hampton Urban Council*, [1898] 2 Ch. 331, followed.

MERRICK *v.* LIVERPOOL CORPORATION
Eve J. 449

2. —— *Hospital — Agreement by Local Authorities for Joint Use of Hospital—Management Expenses apportioned—Notice by one Local Authority to determine Agreement — Validity of Notice—Judgment for Arrears of Management Expenses—Excusable Delay—Mandamus to levy retrospective Rate—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 210—*Adjustment of Liabilities—Local Government Act*, 1888 (51 & 52 *Vict. c.* 41), *s.* 62

Under s. 210 of the Public Health Act, 1875, which corresponds with s. 89 of the Public Health Act, 1848, and enacts that a retrospective rate may be levied to pay charges and expenses incurred within six months of the making of the rate, a judgment, obtained in an action brought to enforce a liability incurred more than six months before the commencement of the action, itself operates as a charge within the meaning of the section, and a mandamus may go to levy a retrospective rate to satisfy such judgment where the delay in bringing the action was under the circumstances excusable.

Under the terms of a deed made in 1885 the predecessors in title of the plaintiffs and of the defendants, and the corporation of B., were entitled to the joint use of a hospital, and the expenses of maintaining the hospital were yearly apportioned between and paid by the several authorities. In 1898 another deed was made between the same authorities or their successors by which the provisions of the deed of 1885 as to the management of the hospital were varied, and it was provided that that agreement might be determined by a six months' notice in writing. Under the terms of a third deed made in 1905 between the plaintiffs and the defendants and the corporation, and stated to be supplemental to the two previous deeds, the corporation withdrew and were released from all liability under the deeds of 1885 and 1898, and the provisions for the management of the hospital were again varied. In April, 1906, the defendants gave notice under the deed of 1898 to determine the three deeds and ceased to use the hospital and to contribute to its maintenance. After long negotiations which terminated in November, 1909, the plaintiffs in December, 1909, brought an action to recover from the defendants their proportion of the management expenses of the hospital for the three years prior to March 31, 1909 :—

Held, that the notice was invalid and that the deeds of 1885 and 1905 were still subsisting, and constituted an agreement adjusting liabilities and expenses within the meaning of s. 62 of the Local Government Act, 1888, and that the defendants were not entitled to have the questions between themselves and the plaintiffs referred to arbitration under sub-s. 2 of that section.

Held, also, that the delay in commencing the action was in the circumstances excusable, and that the plaintiffs were entitled to judgment for the arrears and to a mandamus ordering the defendants to levy a rate to satisfy the judgment and interest.

Principle of *Reg.* v. *Rotherham Local Board*, (1858) 8 E. & B. 906, and *Worthington* v. *Hulton*, (1865) L. R. 1 Q. B. 63, applied.

WOLSTANTON UNITED URBAN DISTRICT COUNCIL *v.* TUNSTALL URBAN DISTRICT COUNCIL – – – – **Neville J. 347**

LOCAL GOVERNMENT—*continued.*

—— Corporation—Borrowing powers – **560**
See CORPORATION.

LONDON — *Streets — Metropolis Management — Widening Street—Notice to treat for "part of" a Factory—Invalid Notice—Injunction—Michael Angelo Taylor's Act*, 1817 (57 *Geo.* 3, *c. xxix.*), *s.* 80.

A local authority requiring part of a factory for the purpose of widening a street cannot under Michael Angelo Taylor's Act compel the owner to sell such part only, if the removal of that part will substantially injure the factory so that it can no longer be used and enjoyed as it was before, even if the part that would be left would be a substantial building which would with some alteration and rearrangement be capable of being efficiently used as a factory, though with some diminution in area and output.

The ruling of Stirling J. in *Gibbon* v. *Paddington Vestry*, [1900] 2 Ch. 794, 802, discussed and applied. GREEN *v.* HACKNEY CORPORATION **Neville J. 105**

—— Electric light—Connecting two areas of supply of one company by mains—Right to break up streets and lay mains outside company's areas – – **208**
See ELECTRIC LIGHT. 1.

MANDAMUS—Agreement by local authorities for joint use of hospital—Mandamus to levy retrospective rate — Excusable delay – – – – – **347**
See LOCAL GOVERNMENT. 2.

MARKET—Lease—Substructure and supports of market — Covenant — Iron girders — Deterioration — Standard of strength
See LANDLORD AND TENANT. 2. **314**

MARRIAGE—Will—Condition as to consent to marriage—Marriage with consent in testator's lifetime—Codicil confirming will after the marriage – – **322**
See WILL. 2.

MEETINGS—Company—Scheme of arrangement—Winding-up—Meetings of members—Separate classes – – – – **477**
See COMPANY. 7.

MEMORANDUM AND ARTICLES OF ASSOCIATION—Company.
See under COMPANY.

MERGER—Mortgage — Subrogation — Payment off by stranger—Equitable transfer—Presumption that security is kept alive—Ignorance of mortgagor – – **277**
See MORTGAGE.

METROPOLIS.
See under LONDON.

MICHAEL ANGELO TAYLOR'S ACT, 1817 – 105
See LONDON.

MINES—Trustee—Power to grant mining leases—Unopened mines – – – **329**
See TRUSTEE.

MISDESCRIPTION — Settlement — Mistake of fact—Clerical error—Tail male instead of tail general – – – – **225**
See SETTLEMENT.

MISREPRESENTATION—Veterinary surgeon—One man company—Unqualified person managing director—Managing director described as "specialist" – – **401**
See VETERINARY SURGEON.

MISTAKE—Settlement—Mistake of fact—Misdescription—Clerical error—Tail male instead of tail general – – **225**
See SETTLEMENT.

MONEY-LENDERS — *Register — Firm Name—Partners' Names — Real Partner's Name not registered—Securities void—Assignee for Value without Notice—Money-lenders Act*, 1900 (63 & 64 *Vict. c.* 51), *ss.* 1 (5.), 2, 3.

In the register under the Money-lenders Act, 1900, the names of C. A. Bond and J. C. Bennet were entered as money-lenders trading in the firm name of Lewis & Co., and their names were also entered as constituting the individual members of the firm. C. A. Bond was not, in fact, a member of the so-called firm, but was merely the nominee or agent of one G. C. Bond, who found all the capital:—

Held, that securities taken in the individual names of C. A. Bond and J. C. Bennet or either of them, or in the name of Lewis & Co., were illegal and void under ss. 2 and 3 of the Act.

Held, also, that a bona fide purchaser for value of the securities without notice of the defect in the registration of the firm was in no better position. *In re* ROBINSON. CLARKSON *v.* ROBINSON – – – **Neville J. 571**

MORTGAGE—*Merger — Subrogation — Payment off by Stranger—Equitable Transfer—Presumption that Security is kept alive—Ignorance of Mortgagor — Agreement by Stranger to take different Security.*

Mrs. Rice, the wife of C. L. Rice, was the owner of a leasehold house in Bristol and of property in Cardiff, which were together subject to a charge in favour of a bank to secure 450*l.* and interest, and the title deeds of both properties were deposited with the bank. Mr. Rice asked the plaintiff to lend him 450*l.* for the purpose of paying off the mortgage. The plaintiff thought the mortgaged property belonged to Mr. Rice and did not know of the Cardiff property, and he agreed to advance the money upon having a legal mortgage for 300*l.* on the Bristol property and a guarantee of 150*l.* by Mr. and Mrs. Rice's solicitor, who was to hold the deeds for him in the meantime. Mrs. Rice did not know of this transaction. The money was paid and the deeds of the Bristol property were now in the custody of the solicitor as stakeholder. Mrs. Rice refused to execute a mortgage in favour of the plaintiff, and he brought this action against her, her husband, and the solicitor for a declaration that he was entitled to a charge

MORTGAGE—*continued.*

on the Bristol property for 450*l.* and interest. The question was whether the mortgage must be presumed to have been kept alive in the plaintiff's favour :—

Held, on the facts, that it must be presumed that the plaintiff intended to keep the charge alive in his own favour ; that the fact that Mrs. Rice, the owner of the mortgaged property, had not requested him to make the payment and did not know of the transaction was immaterial ; that the fact that he intended to take a different security did not affect the question ; and that he was entitled to a charge on the Bristol property for 450*l.* and interest. BUTLER *v.* RICE
Warrington J. 277

—— Clog on equity of redemption—Debentures —Floating charge on foreign land **502**
See CONFLICT OF LAWS. 1.

—— Company—Debentures—Future property—Floating charge—Trust deed—Restriction against creation of prior mortgages —Purchase by company – – **306**
See COMPANY. 2.

—— Insurance — Life policy — Mortgages — Priorities—Notice – – – **291**
See INSURANCE (LIFE).

—— Mortmain—Colonial mortgages — Applicability of Colonial mortmain law **333**
See CONFLICT OF LAWS. 2.

—— Tenants for life trustees — Mortgage of life or other interest—Concurrence of mortgagee – – – – **35**
See VENDOR AND PURCHASER. 3.

—— Will—Gift of leasehold house, the legatee performing the conditions of the lease—Mortgage of house and dividends in one mortgage—Foreclosure — Disclaimer — Liability for repairs to house – **230**
See WILL. 3.

MORTMAIN—Colonial mortgages—Applicability of Colonial mortmain law – – **333**
See CONFLICT OF LAWS. 2.

MUNICIPAL CORPORATION.
See under CORPORATION.

NEXT FRIEND—Infant—Unsuccessful action —Costs and damages—Indemnity—Declaration – – – – **393**
See INFANT.

NEXT OF KIN—Residue, Bequest of—"Equally between" statutory next of kin—Per stirpes or per capita – – – **74**
See WILL. 6.

NOTICE—Company—Debentures—Trust deed—Vendor's lien — Legal mortgage — Priority—Constructive notice—Extent —Second mortgage – – – **306**
See COMPANY. 2.

NOTICE—*continued.*

—— Company—Winding-up—Reconstruction—Dissentient shareholder — Registered office in Rhodesia—Notice of dissent left at London office – – – **95**
See COMPANY. 10.

—— Hospital, Agreement by local authorities for joint use of—Notice by one local authority to determine agreement—Validity of notice – – – **347**
See LOCAL GOVERNMENT. 2.

—— Insurance — Life policy — Mortgages — Priorities – – – – – **291**
See INSURANCE (LIFE).

—— Money-lenders—Real partner's name not registered—Securities void — Assignee for value without notice – – **571**
See MONEY-LENDERS.

—— Street, Widening — Notice to treat for "part of" factory—Invalid notice—Injunction – – – – **105**
See LONDON.

NUISANCE—Sewage—Injunction to restrain—Practice—Execution—Enforcing order against corporation—Writ of sequestration – – – – – – **190**
See SEQUESTRATION.

ONTARIO—Laws of.
See under CANADA.

ORIGINATING SUMMONS—Trust instrument—Declared trust void for illegality — Resulting trust—Application to enforce —No question of construction – **547**
See PRACTICE. 1.

OVERDRAFT—Corporation—Borrowing powers —Power to borrow for specific purposes —General overdraft — Interest—Ultra vires – – – – – – **560**
See CORPORATION.

PARCELS—Form of conveyance — Description by reference to plan—Restrictive words —Right of vendor to insert– – **60**
See VENDOR AND PURCHASER. 2.

PARLIAMENTARY DEPOSITS AND BONDS ACT, 1892 – – – – – **1**
See TRAMWAYS. 2.

"PASSING OFF" ACTION—Essentials to constitute — Trade description — Necessity for identification – – – **198**
See TRADE DESCRIPTION.

PATENT—*Infringement — Invalidity — Amendment of Specification — Disclaimer — Terms — Damages — Injunction — Member of Public — Patents and Designs Act*, 1907 (7 *Edw.* 7, *c.* 29), *ss.* 22, 23, 33—*Rules of the Supreme Court, Order LIII.A, r.* 23.

As a general rule the Court will not in the exercise of its discretion in allowing an amendment of a patent under s. 22 of the Patents and

PATENT—*continued.*

Designs Act, 1907, impose a condition, in the absence of special circumstances, preventing the applicant from maintaining any actions whatever in respect to matters prior to the date at which leave to amend is given; but it will in some cases declare that, in addition to the restriction on recovery of damages provided by s. 23, the patentee shall not sue for an injunction in respect of the use of the invention before disclaimer, unless he establishes that his original claim was framed in good faith and with reasonable skill and knowledge.

The plaintiffs in an action for infringement of their patent applied by motion for an order that they might be at liberty to amend their specification by way of disclaimer and that the specification so amended might be used in evidence at the trial of the action upon such terms as the Court might think fit. On November 26, 1909, an order was made by consent whereby, the plaintiffs undertaking not to proceed with and (if required) to consent to orders staying (pending the application) all proceedings in all their other pending actions for infringement of their patent, and to abide by the order of the Court as to the terms which the Court might thereafter think fit to impose as to the matters mentioned in Rules of the Supreme Court, Order LIII.A, r. 23 (*b*), including terms as to the costs of the action and all the other pending actions for infringement of the patent, and not in the meantime to threaten actions for infringement, and to give notice of this order to all the defendants in the other pending actions for infringement, the Court ordered that the applicants should be at liberty to proceed with their application for leave to amend, and that the application should be heard on affidavit evidence. The application now came on for hearing:—

Held, that the proposed amendments came within s. 22 of the Patents and Designs Act, 1907, and that they ought to be allowed upon the terms that the applicants should pay the costs of and occasioned by the application to amend, including costs of persons who had served notice of opposition under Rules of the Supreme Court, Order LIII.A, r. 23; that by consent all the other pending actions for infringement brought by the applicants should be discontinued, with the usual orders as to costs; that no relief by way of damages or injunction should be sought by the applicants in respect of any razors made in or imported into England before November 26, 1909, if the judge at the trial should hold that their original claim was not framed in good faith or with reasonable skill and knowledge; and that the applicants should undertake not to claim any relief in respect of any razor purchased by or coming to the hands of any member of the public, as distinct from the trade, prior to November 26, 1909. GILLETTE SAFETY RAZOR COMPANY *v.* LUNA SAFETY RAZOR COMPANY – – – **Parker J. 373**

2. —— *Lapse due to "unintentional" Omission to pay Fee — Application for Restoration — Patents and Designs Act*, 1907 (7 *Edw.* 7, *c.* 29), *s.* 20.

The holder of a patent in respect of an invention applied for a fresh patent in respect of improvements on it, intending to include in it the old invention. Under the erroneous impression that the new patent would protect the original invention and that the patent already protecting it might be allowed to lapse, he omitted to pay the fee in respect of it and allowed it to lapse. On an application for restoration of the lapsed patent:—

Held, that the omission was not an "unintentional" one within the meaning of s. 20 of the Patents and Designs Act, 1907, and that the Court had no jurisdiction to restore the patent.

Quære, whether there is an appeal from the Comptroller-General until after there has been advertisement and opposition under s. 20, sub-s. 3. *In re* LAND'S PATENT – – **Parker J. 236**

PAYMENT OUT OF COURT—Wrong person—Liability of Consolidated Fund – **481**
See PRACTICE. 2.

PER STIRPES OR PER CAPITA—Bequest of residue—"Equally between" statutory next of kin – – – – **74**
See WILL. 6.

PERPETUITY—Title—Power of appointment—Independent alternative gifts—Validity of ultimate gift—Settled land – **35**
See VENDOR AND PURCHASER. 3.

"PERSON"—Lease — Assignment to limited company—Consent not to be withheld from "a respectable and responsible person"—Forfeiture – – – **525**
See LANDLORD AND TENANT. 1.

PLAN—Description by reference to plan—Restrictive words—Right of vendor to insert – – – – – **60**
See VENDOR AND PURCHASER. 2.

POWER OF APPOINTMENT — *Execution — Power to appoint up to a limited Amount — General Power — Exclusion from Benefit thereunder of Person disputing Will — Charge — Overriding Power to appoint Mixed Fund — Wills Act*, 1837 (1 *Vict. c.* 26), *s.* 27

W. by his will gave his real and personal estate to trustees in trust to permit his wife to receive the income during her life, and directed that she should have power by her will to appoint that the trustees of his will should on her death raise and set apart out of his estate and effects enough money to produce the sum of 2*l.* 10*s.* per week, and that she should have absolute power by her will to dispose of that sum when raised and the income thereof as she might think fit, expressing by his will a wish that she should be able, if she desired, to direct the payment of the 2*l.* 10*s.* per week to his son J. during his life, but that, if she should not think fit to exercise the power in favour of J., she should have full power to dispose of the sum so raised and the income thereof in such manner as she might in her uncontrolled discretion think best. "Subject as aforesaid" W. gave his estate and effects in trust,

POWER OF APPOINTMENT—*continued.*

after his wife's death, in favour of his children. A power of sale was given by W.'s will, whereby it was also declared that any of W.'s children who should call in question his will should be deprived of all interest thereunder, and that if J. should do so, testator's wife should not be able to exercise the power to appoint in his favour.

J. died before the wife, who by her will gave all the residue of her real and personal estate not thereby otherwise disposed of upon certain trusts :—

Held, (1.) that a charge on the testator's residuary real and personal estate for any sum which his wife might appoint under the power was created by the words "subject as aforesaid"; (2.) that, notwithstanding the words as to the children calling in question the will, she had, in the events which happened, a general power of appointment in respect of the sum which might be raised; (3.) that, although there was no trust for conversion, the power was an overriding one to appoint a fund of mixed realty and personalty; and (4.) that, by virtue of s. 27 of the Wills Act, 1837, the power was exercised by the residuary gift in the wife's will.

In re Jones, (1886) 34 Ch. D. 65, followed.

In re Salvin, [1906] 2 Ch. 459, distinguished.

In re WILKINSON. THOMAS *v.* WILKINSON **Parker J. 216**

2. —— *Revocation — Settlement — Special Power—Investment of Part of Trust Fund in Real Estate—Appointment of Real Estate with Power of Revocation—Subsequent Appointment of Whole of Trust Fund without Reference to previous Appointment — Inconsistency — Equitable Interest—Absence of Words of Inheritance.*

A marriage settlement conferred upon the husband and wife a joint power to appoint the trust moneys, stocks, funds and securities comprised in the settlement amongst children and issue, and the settlement contained a power to invest the trust funds in the purchase of real estate. The husband and wife appointed certain real estate purchased out of the trust funds, upon trust upon the death of the survivor for their eldest son, his heirs and assigns, with a power of revocation and reappointment, and subsequently, without referring to the previous appointment, they, in exercise of the power of appointment given to them by the settlement and of every other power enabling them in that behalf, appointed the whole of the trust moneys, stocks, funds, and securities comprised in the settlement, upon trust (subject to their respective life estates) for all their children equally :—

Held, that the second appointment was not a revocation of the first.

Per Farwell L.J.: *Semble*, if the second appointment had operated to pass the real estate, having regard to the absence of words of inheritance, the children would have taken life estates only.

In re Tringham's Trusts, [1904] 2 Ch. 487, and *In re Oliver's Settlement*, [1905] 1 Ch. 191, explained. *In re* THURSBY'S SETTLEMENT. GRANT *v.* LITTLEDALE – – **C. A. 181**

POWER OF APPOINTMENT—*continued.*

3. —— *Special Testamentary Power — Release — Restriction on Exercise in favour of Particular Object—Inconsistent Appointment.*

The donee of a testamentary power of appointment among children and issue may covenant that he will not exercise the power in such a way as to reduce the share of a particular object below a certain amount, and thereafter the power can only be exercised subject to the limitation or fetter imposed by the negative covenant. The donee may satisfy the covenant either by appointing by will to the covenantee the named sum or by so appointing to other objects as that there shall remain unappointed such a sum as shall result in the covenantee receiving the named sum, but the covenant cannot operate affirmatively as an appointment, since that would be to allow a power exercisable by will only to be exercised by deed.

Davies v. *Huguenin*, (1863) 1 H. & M. 730, overruled on this point.

A lady had under her marriage settlement a testamentary power of appointment over a fund among her children and issue, and in default of appointment the fund was to be divided after the death of the survivor of the husband and wife among her children equally. In exercise of her power of appointment she appointed by her will a sum of 60,000*l.* to be divided between her six sons and settled upon them and their children and the residue to be divided into sevenths and settled upon her six sons and her daughter and their children. Subsequently she covenanted with three of her sons not to exercise her testamentary power of appointment in such a way as to reduce their respective shares in the fund below 7000*l.* apiece :—

Held, that the fetter imposed by these covenants involved the consequence that each of her seven children should receive 7000*l.* absolutely as in default of appointment, and that the appointment operated only over the balance of the fund after deducting 49,000*l.* *In re* EVERED. MOLINEUX *v.* EVERED – **C. A. 147**

—— Title—Perpetuity—Independent alternative gifts—Validity of ultimate gift—Settled land – – – – **35**
See VENDOR AND PURCHASER. 3.

PRACTICE—*Originating Summons—Trust Instrument—Declared Trust void for Illegality—Resulting Trust — Application to enforce—No Question of Construction—Rules of the Supreme Court, Order* LIV.A, *rr.* 1, 4; *Order* LV., *r.* 3.

Where the trust declared by an instrument is void for illegality, the settlor claiming by way of resulting trust is not a "cestui que trust under the trust of" that instrument and cannot therefore enforce the resulting trust by an originating summons under Order LV., r. 3.

Semble. If no question of construction arises under the instrument, the Court, even if it has jurisdiction, will not give partial relief by making "a declaration of the rights of the persons interested" under the discretionary Order LIV.A, rr. 1, 4, but will leave the whole matter to be dealt with in an action to enforce the resulting

PRACTICE—*continued.*

trust. *In re* AMALGAMATED SOCIETY OF RAILWAY SERVANTS (PARLIAMENTARY FUND TRUSTS). ADDISON *v.* PILCHER
Swinfen Eady J. 547

2. —— *Payment out of Court—Wrong Person—Liability of Consolidated Fund—Court of Chancery (Funds) Act*, 1872 (35 & 36 *Vict. c.* 44), *ss.* 5, 6, 14—*Supreme Court of Judicature (Funds, &c.) Act*, 1883 (46 & 47 *Vict. c.* 29), *ss.* 1, 3.

Where money is ordered to be paid out of Court to a person apparently but not really entitled, and the Paymaster-General obeys the order, then, except possibly in cases where the order was obtained by fraud or forgery, the person really entitled, though not before the Court when the order was made, has no claim upon the Consolidated Fund.

Court of Chancery (Funds) Act, 1872, and Supreme Court of Judicature (Funds, &c.) Act, 1883, considered and explained.

In re Dangar's Trusts, (1889) 41 Ch. D. 178, 186, followed.

Jones v. *Jones*, (1879) [1901] 1 Ch. 464, n., and *Bath* v. *Bath*, [1901] 1 Ch. 460, explained.

Slater v. *Slater*, (1888) [1897] 1 Ch. 222, n., and *Marsh* v. *Joseph*, [1897] 1 Ch. 213, distinguished. *In re* WILLIAMS' SETTLED ESTATES
Swinfen Eady J. 481

—— Execution — Enforcing order against corporation — Writ of sequestration — Injunction to restrain sewage nuisance – – – – – **190**
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PREFERENCE — Company — Fraudulent preference—Voluntary followed by compulsory winding-up—Date of act of bankruptcy – – – – **78**
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PRESUMPTION— Mortgage—Merger—Subrogation—Payment off by stranger—Equitable transfer—Presumption that security is kept alive—Ignorance of mortgagor
See MORTGAGE. **277**

PRINCIPAL AND AGENT—*Management of Real Estates—Limited Company appointed Agent—Company employing its Officials in the Management on Commission and Salaries—Articles of Association—Accounts.*

The principle that, in a contract of agency between individuals, the agent cannot make a profit for himself beyond the remuneration fixed by the contract, equally applies to the directors of a corporation that contracts with an individual to act as his agent at a certain remuneration.

Where, therefore, a limited company agreed with the plaintiff to manage, develop, and realize his estates on certain terms, and in the course of such management employed one of its directors, who was a solicitor, to act professionally for the estates and paid his bills of costs, which included profit items; another director, who was an estate agent, to manage at a salary a business connected with the estates; another director, who was an auctioneer, to act as auctioneer on all sales of

PRINCIPAL AND AGENT—*continued.*

the estates at the usual commission; and gave its secretary, who was a chartered accountant, an additional salary for keeping the books of the estates, which were of a complex nature:—

Held, that in taking the accounts between the plaintiff and the company under the agreement all the above salaries, commissions, and profit costs must be disallowed, although the company had power under its articles of association to employ its officers in such capacities and to pay them.

Kavanagh v. *Workingman's Benefit Building Society*, [1896] 1 I. R. 56, approved. BATH *v.* STANDARD LAND COMPANY – **Neville J. 408**

PRINCIPAL AND SURETY— Debenture-holders' action—Receiver and manager—Bond—Sureties—Default—Rights of trade creditors – – – – – **470**
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PRIORITY — Company — Debentures — Future property—Floating charge—Trust deed—Restriction against creation of prior mortgages—Legal mortgage – **306**
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RECEIVER — Debenture-holders' action — Receiver and manager—Bond—Sureties—Default—Rights of trade creditors **470**
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REVENUE—*Estate Duty — Incidence — Settlement of several Estates to different Uses — Estates subject to Mortgages of different Amounts — Creation of Term in one Estate for Purpose of discharging Mortgages on all—Payment off of Mortgages by Trustees of Term—Recoupment of Estate Duty by Persons entitled to Estates benefited—"Person entitled to any sum charged"—Finance Act*, 1894 (57 & 58 *Vict. c.* 30), *s.* 14, *sub-s.* 1.

By the Finance Act, 1894, s. 14, sub-s. 1, "In the case of property which does not pass to the executor as such, an amount equal to the proper rateable part of the estate duty may be recovered by the person, who being authorised or required to pay the estate duty in respect of any property has paid such duty, from the person entitled to any sum charged on such property (whether as capital or as an annuity or otherwise), under a disposition not containing any express provision to the contrary":—

Held, that a person entitled to the benefit of a trust for the application of the rents and profits of an estate in the discharge of the incumbrances on his own estate was not a person "entitled to any sum charged" on such estate "whether as capital or as an annuity or otherwise" within the meaning of the sub-section.

A testator settled his A., B., and C. estates to different uses in strict settlement, and limited his D. estate to trustees for a term of 1000 years, and subject to the term he settled the estate as to one moiety to the uses declared of the A. estate, and as to the other moiety to the uses declared of the B. estate. And he declared that the term of 1000 years was limited to the trustees upon trust to apply the rents and profits of the D. estate in the discharge of the mortgage debts and other gross sums charged upon the four estates or any of them:—

Held, that the estate duty payable in respect of the D. estate was a first charge on that estate and was raisable by mortgage or sale thereof, and that the interest on any mortgage so raised was payable out of the rents and profits of that estate with no right of recoupment of either capital or income as against any other of the estates.

In re EARL OF STAMFORD AND WARRINGTON. PAYNE *v.* GREY - **Warrington J. 83**

—— Probate duty—Direction to pay out of specific fund—Will made before Finance Act, 1894—Death after Act—Estate duty - - - - - - **69**
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REVOCATION—Appointment of real estate with power of revocation — Subsequent appointment of whole of trust fund without reference to previous appointment—Inconsistency - - **181**
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SATISFACTION—Donatio mortis causa—Subsequent will — Revocation — Legacy of equal amount – – – – **285**
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SEQUESTRATION—*Practice—Execution — Enforcing Order against Corporation—Writ of Sequestration—Injunction to restrain Sewage Nuisance—Undertaking to cleanse Stream—Breach of Injunction — Non-performance of Undertaking—"Wilful disobedience"—Rules of the Supreme Court*, 1883, *Order XLII., r.* 31—*Solicitor and Client Costs.*

Where a person or corporation is restrained by injunction from doing a particular act, the person or corporation commits a breach of the injunction, and is liable to process for contempt, if he or it in fact does the act, and it is no answer to say that the act was not contumacious, in the sense that in doing it there was no direct intention to disobey the order.

The expression "wilfully" in Order XLII., r. 31, is intended to exclude only casual or accidental and unintentional disobedience to an order of the Court.

Fairclough v. *Manchester Ship Canal Co.*, [1897] W. N. 7, and *Attorney-General* v. *Walthamstow Urban Council*, (1895) 11 Times L. R. 533, followed.

In the case of a corporation, such as an urban district council, which can only act by its servants or agents, if the act is in fact done, the corporation cannot escape liability for its commission by proving that it was done by its servant or agent through carelessness, neglect, or even in dereliction of his duty.

Rantzen v. *Rothschild*, (1865) 14 W. R. 96, followed.

By an order of Court the defendants were restrained by injunction from sending sewage into a stream, and by the same order they undertook to cleanse the stream. They committed breaches of the injunction and failed to cleanse the stream in accordance with their undertaking.

The Court directed a writ of sequestration to issue against the defendants, but to lie in the office for six months, and not to issue at all if within that period the defendants performed their undertaking to the satisfaction of a person agreed upon by the parties, and ordered the defendants to pay the plaintiffs' costs as between solicitor and client. STANCOMB *v.* TROWBRIDGE URBAN DISTRICT COUNCIL **Warrington J. 190**

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SETTLED ESTATE—*Tenant for Life and Remainderman—Residue—Testator's Liabilities—Annuity—Contingent Liability—Capital and Income—Apportionment—Past and future Instalments—Interest.*

J. T. Poyser by his will left his residuary real and personal estate to trustees upon trust for sale and conversion and to pay debts and legacies, and then for his eight children, of whom one was to have one fifteenth and the others two fifteenths each, and he settled all the shares wholly or partially upon trust for the son or daughter for life with remainders over. By a settlement made on the marriage of one of his sons before the date of his will the testator had covenanted to pay to that son an annuity of 250*l.* a year. The testator died in 1901, leaving a very large estate. His widow and all his children were living, and owing to a mistaken view of the construction of the will the son's annuity had not been paid. The trustees had sufficient funds, representing capital, in hand to pay the arrears, but a question was raised whether, as between the tenants for life and remaindermen of the settled shares, part of the burden of paying the past and future instalments of the annuity ought not to be borne by the tenants for life :—

Held (following *In re Perkins*, [1907] 2 Ch. 596), that each instalment of the annuity must be apportioned between capital and income by calculating what sum if set aside at the testator's death would, with simple interest at 3½ per cent. to the day of payment, have met the particular instalment ; and that the sum so ascertained ought to be chargeable to capital and the balance to income, having regard to the number of shares into which the estate was divisible. *In re* POYSER. LANDON *v.* POYSER – **Parker J. 444**

SETTLED LAND—Title—Perpetuity—Power of appointment—Independent alternative gifts—Validity of ultimate gift – **35**
See VENDOR AND PURCHASER. 3.

SETTLEMENT—*Mistake of Fact—Misdescription—Clerical Error—Tail Male instead of Tail General—Settlement—Construction.*

By a marriage settlement made in 1886 it was provided that if the eldest son of the settlor should become entitled to W. Montgomery's real estate under his will for an estate in tail male he should be excluded from all share in the trust funds subject to the settlement. E. M. Alexander was the settlor's eldest son, and under the limitations of the will of W. Montgomery, who died in 1868, he became entitled to the testator's real estate for an estate in tail general. The trustees of the settlement took out a summons to determine whether he had lost his right to a share in the settlement funds :—

Held, that inasmuch as the intention of the settlor was clear and at the date of the settlement she must have known that if E. M. Alexander came into the testator's real estate it must be for an estate in tail general, not an estate in tail male, the insertion of the word "male" in the

SETTLEMENT—*continued.*

settlement must be treated as a misdescription, and the settlement construed as if the word were omitted ; and that E. M. Alexander was excluded from sharing in the settlement moneys, without prejudice to his claims if the younger son died. *In re* ALEXANDER'S SETTLEMENT. JENNINGS *v.* ALEXANDER – – – – **Parker J. 225**

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7 Edw. 7, c. 29, s. 20—*Patents and Designs* **236**
See PATENT. 2.

—— —— ss. 49, 50, 93 – – – – **25**
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8 Edw. 7, c. 69, s. 17, sub-s. 1—*Companies (Consolidation)* – – – – **169**
See FRIENDLY SOCIETY.

—— —— s. 40, sub-s. 1 – – – – **464**
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—— —— s. 55 – – – – – **498**
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—— —— ss. 93, 212 – – – – **120**
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—— —— s. 120 – – – – – **477**
See COMPANY. 7.

—— —— s. 192, sub-s. 3 – – – **95**
See COMPANY. 10.

—— —— s. 210 – – – – – **78**
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—— —— c. clxvii., s. 4 — *London Electric Supply* – – – – – **208**
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STREETS—Electric light—Right to break up streets and lay mains – – – **208**
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—— Widening street—Notice to treat for "part of" a factory—Invalid notice—Injunction – – – – – – **105**
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SUBROGATION—Mortgage—Merger—Payment off by stranger—Equitable transfer—Presumption that security is kept alive—Ignorance of mortgagor – – **277**
See MORTGAGE.

SUMMONS — Originating summons — Trust instrument—Declared trust void for illegality – – – – – **547**
See PRACTICE.. 1.

"**SUPPLY**" — Electric lighting — Municipal corporation — Statutory powers — "Supply" of electricity – – **359**
See ELECTRIC LIGHT. 2.

SUPREME COURT OF JUDICATURE (FUNDS, &c.) ACT, 1888 – – – – **481**
See PRACTICE. 2.

SURETY—Principal and.
See under PRINCIPAL AND SURETY.

SURGEON—Veterinary surgeon.
See under VETERINARY SURGEON.

TENANT—Landlord and.
See under LANDLORD AND TENANT.

TENANT FOR LIFE—Settled estate.
See under SETTLED ESTATE.

TITLE—Deed—Assignment for value—Defective title—Subsequent acquisition of good title—Equitable estoppel – – **342**
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—— Perpetuity—Power of appointment—Independent alternative gifts—Validity of ultimate gift—Settled land – **35**
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TRADE—Restraint of — Company—Director—Contract of service—Breach of negative covenant—Interdependent contracts
See COMPANY. 3. **248**

TRADE (BOARD OF).
See under BOARD OF TRADE.

TRADE DESCRIPTION—"*Passing off*" *Action — Essentials to constitute—Trade Description — Necessity for Identification of, by Plaintiff, with definite Class of his Goods.*

In order to succeed in a "passing off" action, not based upon an express representation, the plaintiff must prove that the name or the get-up or whatever it may be by which the defendant describes his goods is the recognized description of the plaintiff's goods or of a definite article or class of articles of the plaintiff's goods as and for which the incriminated article or class of articles is being passed off. Further, if the incriminated goods are the goods of the plaintiff himself, i.e., where the defendant is selling certain goods dealt in by the plaintiff, as and for other goods dealt in by the plaintiff, it is equally essential that the plaintiff should be able to define the goods for which the incriminated goods are passed off. In order to determine whether the incriminated goods are passed off or not the whole of the description of them must be looked at, and then the well-known and accepted description of the goods as and for which they are passed off must also be looked at, to see whether the description used by the defendant will lead persons to believe that his goods are those which are denoted by the other description and not the goods which they really are.

The plaintiffs, H. R. & Co., were port wine shippers and merchants. The defendants, who were retail wine merchants, issued a price list in which they advertised the plaintiffs' wine as H. R.'s "Grand Old Crusted Port. Over six years in bottle . . . . Usual credit price per doz. 60*s*. Now offered by us at per doz. 34*s*." The plaintiffs sold two distinct classes of port wine, one a superior wine and the other an inferior and cheaper wine. In both cases, with a few exceptions, the wine was sold by them in the cask. The plaintiffs alleged that the defendants were passing off the plaintiffs' inferior wine as and for their superior wine. It was proved that the plaintiffs sold no wine matured in bottle as to which it could be said

TRADE DESCRIPTION—*continued.*

that it was part of its description that its usual credit price was 60*s.* per dozen :—

Held that, the plaintiffs having no separate and distinct class of wine to which the description "usual credit price per doz. 60*s.*" was attached, the description in the defendants' price list was inapplicable to the plaintiffs' superior wine, and therefore there was no passing off by the defendants of the plaintiffs' inferior wine as and for their superior wine. HUNT, ROOPE, TEAGE & CO. *v.* EHRMANN BROTHERS **Warrington J. 198**

TRADE MARK — *Registration—Special Application — Distinctive Word — User — Foreign Language—Trade Marks Act*, 1905 (5 *Edw.* 7, *c.* 15), *s.* 9, *sub-s.* 5—*Practice—Form of Order.*

A Latin word will not necessarily be refused registration as a trade mark because its English equivalent could not be registered. It may be registered if it has not become a part of the English language and has become distinctive of the applicants' goods by long user and there is no danger of confusion or inconvenience to other traders. When an application is referred by the Board of Trade to the Court under s. 9, sub-s. 5, of the Act of 1905, the Court will not make any declaration that the proposed mark is or may be distinctive, but will only direct the registrar to accept the application in order that it may be proceeded with in the ordinary way. *In re* AKTIEBOLAGET B. A. F. HJORTH & CO.'S TRADE MARK "PRIMUS." **Swinfen Eady J. 64**

2. —— *Registration — Special Application—Liberty to proceed—"Distinctive" Word—Long User — Deceptive Use of Descriptive Word — Trade Marks Act*, 1905 (5 *Edw.* 7, *c.* 15), *s.* 9, *sub-s.* 5.

Upon a special application under s. 9, sub-s. 5, to register the word "diamine" for dyes it was proved that the word, which had been used by the applicants as a trade mark for twenty years, had become extensively known to the trade in the United Kingdom as indicating the goods of the applicants. The word was a known chemical term which indicated that the substance to which the word was applied contained two amine groups, but it was used by the applicants for their dyes, whether they contained one, two, or more amine groups or no amine group at all :—

Held, that the word was not distinctive within the meaning of the sub-section, first, because it was descriptive, and, secondly, because it was used deceptively, and that the application ought not to be allowed to proceed.

Per Buckley L.J. : *Semble*, "adapted to distinguish" contemplates that the word which it is sought to register is one which as a word is adapted to distinguish the goods and not a word which may by user acquire the capacity of distinguishing the goods. *In re* LEOPOLD CASSELLA & CO. GESELLSCHAFT M. B. H. – **C. A. 240**

3. ——*Word directly referring to Character of Goods—Distinctive Word—Name of Article as Trade Mark for it—"Gramophone"—Registration—Protection to other Traders—Trade Marks Act*, 1905 (5 *Edw.* 7, *c.* 15), *ss.* 9, 44.

The Gramophone Company, Limited, and its predecessors in title had before and after the incorporation of the company manufactured and sold talking machines, and for many years had sold and advertised the machines as "gramophones," and the company claimed monopoly rights in the word, as distinguishing goods of the company's manufacture, by warning circulars, legal proceedings, and threats of legal proceedings. To the general public the word "gramophone" denoted a talking machine operating a disc record without any connotation of the source of manufacture ; but to the trade generally the word denoted a talking machine of a particular type and connoted the source of manufacture. The company applied for registration under s. 9, sub-s. 5, of the Trade Marks Act, 1905, of "gramophone" as the company's trade mark in respect of gramophones and sound recording and reproducing instruments, records, parts and accessories :—

Held, that, "gramophone" being the name of the article sold, even assuming the word had by user become distinctive of the company's goods, the application for registration ought not to proceed.

An application under s. 9, sub-s. 5, of the Act in effect admits that the word sought to be registered (not being a geographical name or a surname) has some direct reference to the character or quality of the goods in respect of which it is proposed to be registered.

In the case of a trade mark in actual use, the tribunal, when taking into consideration the extent to which user has rendered the mark in fact distinctive of the applicant's goods, can only have regard to user upon or in connection with goods for the purpose of indicating that such goods are the goods of the person so using the mark, and the acquired distinctiveness must be due to such user.

If a word which has once been the name of an article ought ever to be registered as a trade mark for that article, it can only be when the word has lost, or practically lost, its original meaning ; and so long as the word appropriately describes the article registration ought to be refused.

Observations on s. 44 of the Act.

In re GRAMOPHONE COMPANY'S APPLICATION – – – – – **Parker J. 423**

TRAMWAYS — *Statutory Powers — Tramway Company — Ultra vires — Adjacent Districts — Working Agreement—Agreement for Lease to adjacent Owner — Delegation of Powers by Lessee—Licence to work—Consent of Board of Trade—Tramways Act*, 1870 (33 & 34 *Vict. c.* 78), *ss.* 34, 35, 54.

The plaintiffs, a local authority, were authorized by a special Act which incorporated Parts II. and III. of the Tramways Act, 1870, to construct and maintain certain tramways in their district and to enter into agreements, subject to the approval of the Board of Trade, with tramway owners of adjacent districts with

TRAMWAYS—*continued.*

respect to the construction, sale, lease, working, use, and management by the contracting parties of all or any of their respective tramways. The proposed tramways were adjacent to tramways outside the plaintiffs' district of the defendant company on the west, and of the defendant corporation on the east. Both the defendant company and the defendant corporation had under their special Acts similar powers of entering into working agreements with the tramway owners of adjacent districts, except that the consent of the Board of Trade thereto was not required. The tramways authorized by the plaintiffs' special Act were constructed by the defendant corporation under the terms of an agreement entered into between the plaintiffs and the defendant corporation, with the approval of the Board of Trade, and the defendant corporation were entitled thereunder to a lease for a term of years of the exclusive use of such tramways, but subject to a proviso that they should not assign or sub-let or part with the benefit of the agreement without the leave of the plaintiffs. During the continuance of the agreement the defendant corporation, without the leave of the plaintiffs and without the sanction of the Board of Trade, granted to the defendant company a revocable licence to run over a small portion of the plaintiffs' tramways which adjoined the defendant company's tramways :—

Held, that neither under the Tramways Act, 1870, nor under their special Act had the plaintiffs any power to authorize the defendant company to run cars over their tramways without the consent of the Board of Trade, and that their agreement with the defendant corporation did not purport to confer on the latter any greater right than that which the plaintiffs had authority to grant; *held*, therefore, that the licence granted to the defendant company was ultra vires, and an injunction was granted to restrain the defendant company from using the plaintiffs' tramways.

ECCLES CORPORATION *v.* SOUTH LANCASHIRE TRAMWAYS COMPANY - - **C. A. 263**

2. —— *Statutory Undertaking — Tramway Company — Parliamentary Deposit — Sale of Undertaking before Completion of Works and within the Time limited for Completion—Non-completion — Abandonment — Application of Deposit Fund — Parliamentary Deposits and Bonds Act*, 1892 (55 & 56 *Vict. c.* 27), *s.* 1.

By a special Act of 1885 a tramway company was authorized to construct a tramway and a deposit was ordered to be paid.

The Parliamentary Deposits and Bonds Act, 1892, s. 1, provided that where in pursuance of any general or special Act of Parliament moneys had been deposited "to secure the completion by any company" of any undertaking authorized by Parliament, and the undertaking had "not been completed" within the time limited in that behalf, the deposit fund should be applied towards compensating landowners, and, in the case of a tramway company, the road authorities, and subject thereto, if (among other things) a receiver had been appointed, or the undertaking had been abandoned, for the benefit of the creditors of the company. The special Act of 1885 contained a substantially similar provision as to the application of the deposit fund if the company did not complete the tramway within the time limit.

In 1904, when the tramway had not been completed and before the expiration of the period for completion, a receiver of the undertaking of the company was appointed and the uncompleted tramway was acquired by the London County Council under the powers of a special Act :—

Held, that both under the special Act of 1885 and under the general Act the deposit was paid to secure the completion of the undertaking by the company, and that, inasmuch as that event could never happpen by reason of the transfer of the undertaking, the time had passed within which the company could complete; and, further, that there had been an abandonment of the undertaking by the company; consequently that the deposit moneys paid under the Act of 1885 were applicable for the benefit of the creditors of the company subject to the prior claims (if any) of the landowners and road authorities.

Decision of Neville J., [1909] 2 Ch. 540, affirmed. *In re* PECKHAM, DULWICH AND CRYSTAL PALACE TRAMWAYS BILL - **C. A. 1**

TRUST—Practice—Originating summons—Resulting trust—Application to enforce—No question of construction - **547**
See PRACTICE. 1.

TRUSTEE—*Power to grant Mining Leases—Unopened Mines.*

A testatrix by her will devised to her trustees her undivided share in certain lands upon trust for sale, conversion, and investment and gave them power to postpone such sale and conversion, and declared that whilst any part thereof should remain unsold it should be lawful for her trustees to let and manage and to join with any other person or persons in letting and managing all such part thereof as for the time being should remain unsold, and also gave them power to grant any building or other leases for such term at such rents and upon such conditions as they might think fit. There were mines of coal and other minerals existing under the lands, some of the mines being open and others unopened :—

Held, that the trustees had power to join with the persons entitled to the other undivided shares in the lands in granting mining leases, but that the power did not extend to unopened mines.

Opinion of Kindersley V.-C. in *Clegg* v. *Rowland*, (1866) L. R. 2 Eq. 160, 165, followed. *In re* BASKERVILLE. BASKERVILLE *v.* BASKERVILLE - - - - - **Joyce J. 329**

ULTRA VIRES — Corporation — Borrowing powers - - - - - **560**
See CORPORATION.

ULTRA VIRES—*continued.*

—— Corporation — Purchase by agreement—Special Act—Validity of covenant **12**
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UNDERTAKING—Sewage nuisance, Injunction to restrain—Undertaking to cleanse stream—Breach of injunction—Non-performance of undertaking—"Wilful disobedience" – – – – **190**
See SEQUESTRATION.

USER—Trade mark.
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VENDOR AND PURCHASER — *Corporation — Ultra vires—Purchase by Agreement—Public Health Act*, 1875 (38 *&* 39 *Vict. c.* 55), *s.* 164—*Special Act—Covenant not to erect Buildings—Validity of Covenant—Restriction of Powers given for Benefit of Public.*

When a corporation purchases land by agreement for any of the purposes for which it is authorized to acquire land by the Public Health or other public Acts, or by its special local Acts, it is not ultra vires for the corporation to enter into covenants with the vendor restricting the erection of buildings upon the land purchased which it might erect under other powers given to it for the benefit of the public, provided that such restrictions do not prevent the user of the land for the particular purposes for which it was acquired.

Ayr Harbour Trustees v. *Oswald*, (1883) 8 App. Cas. 623, distinguished.

In re South Eastern Ry. Co. and Wiffin's Contract, [1907] 2 Ch. 366, discussed. STOURCLIFFE ESTATES COMPANY *v.* BOURNEMOUTH CORPORATION – – – – **C. A. 12**

2. —— *Form of Conveyance — Parcels — Description by Reference to Plan—Restrictive Words—Right of Vendor to insert.*

Land was put up for sale by auction under particulars and conditions to which a plan was attached. The plan was a copy of the ordnance map, and upon it was a printed statement to the effect that it was for reference only, and that there was no guarantee of its accuracy, but that it was believed to be accurate. The draft conveyance described the property by reference to a plan, which was a copy of the plan attached to the particulars and conditions. The vendor proposed to insert the words "by way of elucidation and not of warranty," to qualify the reference to the plan.

Held, that he was not entitled to do so, as the description of the property in the draft conveyance was insufficient or unsatisfactory without reference to the plan, in which no material error could be pointed out. *In re* SPARROW AND JAMES' CONTRACT – – – **Farwell J. 60**

3. —— *Title—Perpetuity—Power of Appointment—Independent Alternative Gifts—Validity of Ultimate Gift—Settled Land—Future Trust for Sale—Trustees for Purposes of Settled Land Acts—Tenants for Life Trustees—Mortgagee of Life or other Interest—Concurrence of Mortgagee—Settled Land Act*, 1882 (45 *&* 46 *Vict. c.* 38), *s.* 2, *sub-s.* 8; *s.* 20, *sub-s.* 2, *clauses* (i.) *and* (ii.); *s.* 50—*Settled Land Act*, 1890 (53 *&* 54 *Vict. c.* 69), *s.* 16, *sub-s.* (ii.).

A testator devised his real estate to trustees upon trust to pay the income to his three children, and (in the events which happened) to the survivors and survivor of them for their lives, with power for any child to appoint by will a life interest to his or her wife or husband, and directed that, upon the death of the last survivor of all his children, and any husband or wife to whom an appointment had been made, his trustees should sell his real estate and divide the proceeds equally between all his grandchildren then living. No appointment had been made to any husband or wife not born in the testator's lifetime.

One child died without issue, and the other two had become trustees of the will as well as tenants for life; they had sold part of the testator's estate in 1898 as tenants for life, exercising the statutory power, and had also received the purchase-money as trustees:—

Held, that the trust for sale was not bad for perpetuity, there being alternative independent gifts, on the principle stated in *In re Bowles*, [1905] 1 Ch. 371, and that, inasmuch as the power in favour of a husband or wife had not been exercised so as to raise any question of perpetuity, the ultimate gift to the grandchildren was, in the events which had happened, valid.

Held, also, approving and adopting *In re Jackson's Settled Estate*, [1902] 1 Ch. 258, that the tenants for life were good trustees for the purposes of the Settled Land Acts.

Where a tenant for life sells settled land by virtue of the Settled Land Acts, the exercise of the statutory power overreaches a mortgage by a remainderman, and his concurrence in the conveyance is not necessary.

In re Dickin and Kelsall's Contract, [1908] 1 Ch. 213, approved.

Observations in *In re Mundy and Roper's Contract*, [1899] 1 Ch. 275, 289, explained. *In re* DAVIES AND KENT'S CONTRACT – **C. A. 35**

—— Company—Debentures—Trust deed—Purchase by company—Purchase-money to remain on mortgage—Vendor's lien—Legal mortgage—Priority – – **306**
See COMPANY. 2.

—— Will — Administration — Annuities and legacies charged on property — Continuing liability of residue—Order discharging property – – – **438**
See WILL. 1.

VETERINARY SURGEON—"*Veterinary Sanatorium*"—*One Man Company—Unqualified Person Managing Director—Managing Director described as "Specialist"—Misrepresentation—Injunction—Veterinary Surgeons Act*, 1881 (44 & 45 *Vict. c.* 62), *s.* 17.

Although a limited company is not a "person" within the meaning of s. 17 of the Veterinary Surgeons Act, 1881, and cannot be prosecuted for an offence under that section, an action will lie at the suit of the Attorney-General to restrain the company and its officials from falsely holding out or representing to the public that the individuals who comprise it or are employed by it are veterinary surgeons or persons specially qualified to practise veterinary surgery or any branch thereof.

Attorney-General v. *Myddletons, Ld.*, [1907] 1 I. R. 471, approved and followed.

ATTORNEY-GENERAL *v.* CHURCHILL'S VETERINARY SANATORIUM, LIMITED **Neville J. 401**

WAIVER—Liquidator—Company—Winding-up—Registered office in Rhodesia—Notice of dissent left at London office – – – – – **95**
See COMPANY. 10.

WILL—*Administration—Annuities and Legacies charged on Property—Provision of Fund to answer Annuities and Legacies—Continuing Liability of Residue—Vendor and Purchaser—Order discharging Property—Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 5.

Where annuities and legacies are charged on property, the Court's jurisdiction to set apart a fund to answer the annuities and legacies and distribute the rest of the property is based on administration only, and the exercise of the jurisdiction does not release the rest of the property, which, if the fund fails to answer the annuities and legacies, may be followed into the hands of those who take it.

Notwithstanding the setting apart of the fund, a purchaser of part of the distributed property may validly object to the title in the absence of any release from the annuities and legacies and of an order under s. 5 of the Conveyancing and Law of Property Act, 1881. *In re* EVANS AND BETTELL'S CONTRACT **Parker J. 438**

2. —— *Condition as to Consent to Marriage—Marriage with Consent in Testator's Lifetime—Codicil confirming Will after the Marriage.*

A testator by his will gave real and personal property in trust for his son for life, and on his death, in case he should marry "with the consent in writing of my said wife and my said trustee," in trust for the son's children in equal shares; but if he should marry without such consent, or if he should marry with such consent and should have no child who should live to attain twenty-one years of age, on trust as to the realty for the person or persons who at the time of the son's death would be entitled thereto as the testator's heir or co-heirs at law if he had then died seised thereof intestate, and as to the personalty for the testator's wife.

WILL—*continued.*

The son married in the testator's lifetime with his consent and approbation, and after the marriage the testator made a codicil altering his will, but not the gift above stated, and in all other respects confirming the will. The son's wife died in the testator's lifetime, and the son survived him and died without having married again or had any issue:—

Held, (1.) that the son's marriage fulfilled the condition of the will; (2.) that the codicil had not the effect of requiring the marriage to take place after the testator's death; and (3.) that the gift over in case of marriage with consent but death without children took effect.

Presumption as to testators' intention in cases of conditions involving consents to marriages of their sons or daughters. *In re* PARK. BOTT *v.* CHESTER – – – **Parker J. 322**

3. —— *Leasehold House, Gift of, the Legatee performing the Conditions of the Lease—Independent Gift to same Legatee of Dividends on Stock—Acceptance of Legacies—Mortgage of House and Dividends in one Mortgage—Foreclosure—Disclaimer by Mortgagee of all Interest in House—Liability for Repairs to House—Ownership of Dividends.*

The testator devised a leasehold house to Marian Ross for life, she paying the rent and performing the covenants of the lease; he also left her the dividends of certain stocks for life. By the lease the testator had covenanted to keep the house in repair. Marian Ross accepted the legacies and mortgaged her interests under the will to the defendant society in one mortgage. The society obtained an order for foreclosure but did not take possession of the house. Marian Ross was now a pauper lunatic. The trustees paid the fire insurance premiums on the house and the rent out of the dividends on the stock and handed over the balance to the society. The lessor claimed possession of the house on the ground of breach of covenants to repair it. The society disclaimed all interest in the house and declined to do the repairs although they claimed to be entitled to the dividends on the stocks. On a summons to determine whether they were liable to do the repairs:—

Held, that on accepting the legacies Marian Ross became personally liable to perform the covenants of the lease; that the society had done nothing to make themselves liable to do the repairs; that the gifts in the will were independent; and that the society were entitled to retain the dividends on the stocks without being liable under the lease. *In re* LOOM. FULFORD *v.* REVERSIONARY INTEREST SOCIETY, LIMITED **Parker J. 230**

4. —— *Probate, Effect of—Codicil consisting of List of Names and Pecuniary Amounts—Gift of Legacies.*

A document containing no words of gift, but giving a list of the names of eight persons, and after each name stating a sum of money, was admitted to probate as a codicil:—

Held, that (the Court being bound to assume that all documents admitted to probate are testamentary documents, and it being its duty

WILL —*continued.*

to construe them in order to ascertain the testator's intention as to the disposition of his property and within the limits allowed by law to give effect to that intention) the codicil must be construed as giving to each person named a legacy of the amount set after his name. *In re Campsill*, (1910) 128 L. T. Jour. 548, not followed. *In re* BARRANCE. BARRANCE *v.* ELLIS – – – – – **Parker J. 419**

5. —— *Probate Duty—Direction to pay out of Specific Fund—Will made before Finance Act*, 1894 (57 & 58 *Vict. c.* 30)—*Death after Act—Estate Duty.*

By her will, dated August 20, 1888, when probate duty was in force, a testatrix bequeathed certain Consols to her trustees upon trust for her brother for life and subject thereto upon trust to raise thereout "the amount of the probate duty which may be payable on the proving of this my will in respect of the said Government Consolidated Annuities," the said sum when raised to fall into residue.

The balance of the Consols was given to certain specific legatees.

The testatrix died on August 19, 1896, after the commencement of the Finance Act, 1894, so that estate duty and not probate duty was payable.

The brother died on November 15, 1909, and the Consols became divisible :—

Held, that the direction to raise probate duty did not operate as a direction to raise the larger and widely different estate duty subsequently imposed by the Finance Act, 1894, and the direction was therefore inoperative. *In re* BOXER. MORRIS *v.* WOORE **Swinfen Eady J. 69**

6. —— *Residue, Bequest of — "Equally between" Statutory Next of Kin—Per stirpes or per capita.*

A testator directed his trustees to stand possessed of one moiety of his residuary estate "for and equally between" the persons "who at my death shall be my next of kin according to the statutes for the distribution of the estates of intestates" :—

Held, that as there was no reference to the statutory mode of distribution as in *Holloway* v. *Radcliffe*, (1857) 23 Beav. 163, and *Fielden* v. *Ashworth*, (1875) L. R. 20 Eq. 410, but the statutes were only referred to for the purpose of defining the class, the word "equally" must have its full effect, and the statutory next of kin would take per capita.

Observations in *Mattison* v. *Tanfield*, (1840) 3 Beav. 131, and *Fielden* v. *Ashworth*, L. R. 20 Eq. 410, followed. *In re* RICHARDS. DAVIES *v.* EDWARDS – – – **Swinfen Eady J. 74**

WILL—*continued.*

—— Accumulations.
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—— "Gramophone." – – – – **423**
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—— "Person." – – – – – **525**
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—— "Specialist." – – – – – **401**
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—— "Supply" of electricity. – – **359**
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—— "Unintentional." – – – – **236**
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WRIT—Sequestration, Writ of.
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